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Supreme Court, U.S.
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No. 07

In the Supreme Court of the United States

GARY REINER,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Forfeiture Order Conflict With The Seventh Circuit And The Intention Of CAFRA, And Lead To An Absurd Result? *See United States V. Masters*, 924 F.2d 1362 (1991).

II. Did the First Circuit To Fail Distinguish Legitimate From Illegitimate Proceeds For The Purposes Of Determining Forfeiture? 18 U.S.C. 982(A)(1).

III. Was Reiner Punished For Exercising His Constitutional Right To Trial, Rather Than For The Conduct With Which He Was Charged?

IV. Was the Probability That Juror 19 Could Not Be An Impartial Juror Overwhelming?

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OPINIONS AND ORDERS BELOW

Opinion of the First Circuit, captioned *United States v. Reiner*, is reproduced in the Appendix A attached to this petition ("Pet. App. A") and is published in the Federal Reporter at 500 F.3d 10, 2007 (1st Cir. Me.).

JURISDICTION

The court below had jurisdiction pursuant to 28 U.S.C. §1291, 18 U.S.C. §3742 and Rule 4 of the Federal Rules of Appellate procedure. That court entered judgment affirming petitioner's conviction and sentence on August 20, 2007. This Court has jurisdiction under 28 U.S.C. §1254(1) and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Eighth Amendments and 18 U.S.C. §982(a)(2)(A) are applicable to petitioner's case, and are reproduced in the Appendix.

STATEMENT OF THE CASE

The Defendant Gary Reiner was the attorney for Kittery Health Club, Inc., doing business as The Danish Health Club ("DHC"). Reiner performed legal services for the DHC's original owner, Leo Manzoli, dating back to 1990. In 1995 Leo Manzoli suffered a heart attack in Reiner's presence. Maryanne Manzoli

testified that Reiner saved her husband's life. (595)[1]. At that time, Leo Manzoli asked Reiner to take care of her. (596, 597, 829). Leo Manzoli died the following summer. Reiner viewed it as his job to take care of Maryanne after Leo died. (899).

After Leo Manzoli's death, Joel Lehrer handled the daily operations of the DHC. (830). Reiner had no significant involvement with the DHC while Joel Lehrer was alive beyond representation on various legal issues. (830). Reiner advised prospective DHC employees on compliance with Kittery town ordinances and assisted with paperwork. (832). Following Leo Manzoli's death, his wife Maryanne Manzoli also took a more active role in the business.

Upon the death of Joel Lehrer in October 2001, Reiner became a co-trustee of K and D Realty Trust, which owned the property used by the DHC. (826). Reiner's understanding of his obligations as a trustee was that he was charged by law to operate the trust property as he would with respect to his own property. (827). Maryanne Manzoli was the trust beneficiary. (827). The profits from the DHC and K and D Realty Trust went to Maryanne Manzoli, who took in approximately $300,000.00 per year. (593). The DHC paid rent to K and D Realty Trust. (893).

After Joel Lehrer died, Susan Lehrer ("Lehrer") became the president of the DHC, and through late 2001 she ran and managed the club. Maryanne Manzoli did the bookkeeping. (539). Reiner

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[1] Citations are to trial transcripts.

suggested that Lehrer should protect herself by putting rules in place for DHC employees and mandating compliance. (847). Reiner drafted a set of policies after talking with the owners and managers. (847).

Reiner understood the DHC to be a gentleman's club catering to men who utilized the sauna, steam whirlpool, T.V. and received massages. (847, 848).

Maryanne Manzoli testified that after Joel Lehrer died, Susan Lehrer became unable to manage her affairs. (599, 600). According to Maryanne Manzoli, Reiner went to the DHC when Lehrer was incapable and no one else was available. (600). Maryanne Manzoli testified that Reiner assisted her with banking and facility issues. (601, 602). They discussed advertising and how to increase the number of customers. (557).

Reiner represented the trust concerning Joel Lehrer's estate. (601). In the past Reiner had represented Maryanne Manzoli and the Trust in various matters involving the Internal Revenue Service. Maryanne Manzoli was very nervous about IRS matters and in 2001, she asked Reiner to determine who was stealing money from the club. (604). Maryanne Manzoli testified that she wanted to make sure that every dollar that came into the club was accounted for. (605). Maryanne Manzoli testified that she relied on Reiner, as her attorney, to make sure that the funds were properly accounted for and deposited. (605). Reiner testified he volunteered to make the daily deposits. (875).

Maryanne Manzoli testified that she took care of the K and D Realty Trust property and ran the daily trust affairs. (566). She testified that Reiner assisted with the acquisition, sale, and maintenance of properties at K and D Realty Trust. (573). Reiner billed Maryanne Manzoli for legal services rendered to DHC and K and D Realty Trust at $150.00 per hour. (575, 576).

Reiner testified that he had suspicions that prostitution was occurring at the Club but had no firm evidence of it. (888). Reiner first heard complaints about prostitution in 1992 when a complaint was made to Kittery police. (838). The Kittery police contacted Reiner, as the attorney for the club, and Reiner fully cooperated in the investigation. Reiner arranged for the police to interview Joel Lehrer and the subject attendant. (838). Reiner was aware that the results of the investigation were presented to the York County District Attorney who indicated there was no basis to proceed. (839).

Reiner was also aware of other investigations and specifically a news article where the Kittery police chief indicated there was no prostitution at the Club. (840). Likewise, in 2001 there was another complaint and the ensuing investigation ended in insufficient evidence to proceed. (842).

Reiner testified that Joel Lehrer consistently denied that sex was sold at the club. (848). When Reiner became aware of an internet posting that described sexual favors at the club he told all employees, both as a group and individually, that sexual favors were

not to be sold for money by attendants at the DHC or anywhere else. Reiner told all DHC employees that attendants who did sell sex could no longer work at the DHC. (851, 852).

After Joel Lehrer died, Detective William Hacket of the Kittery police contacted Reiner regarding licensing procedures. (778). Reiner took over the task of submitting new applications to Detective Hacket. (778). Hackett visited the DHC for on-site inspection, some announced, some unannounced (781, 783) and found no violations. (783). Hackett testified that based on his inspections, he certified the business. (784).

Russell Pallas, a former police officer who had obtained a private investigator's license, testified pursuant to a plea agreement with the Government. Pallas testified he started working at the club around November 5, 2001, and that at that time the club was significantly out of control. (291). Susan Lehrer was hospitalized and treated for psychiatric reasons, (292), and was incapable of managing the club. (293). Pallas testified that Lehrer was stealing and failing to deposit money. (293).

Pallas testified that Reiner adopted the rules and regulations for the club including no solicitation for prostitution and no drugs. (293). The purpose of the regulations was to bring order to the club. (294). According to Pallas, Reiner interviewed applicants and assisted them in filling out employment forms (283) and license applications. (283).

Michael Dubois, a criminal investigative special agent of the Internal Revenue Service, testified that on June 9, 2004, he participated in the execution of a search warrant at the DHC in Kittery, Maine. Dubois testified that rules, regulations, policies and procedures for the Kittery Health club effective December 21, 2003, were seized from the club. The rules outline the mission of the club and state in part, "The Danish Health Club encouraged attendants licensed by the Town of Kittery to associate with for the purpose of providing the highest quality relaxation rub to its customers." (110). Other rules included:

> #2. There will be no solicitation of customers for any purpose other than to provide relaxation rubs
> #3. There will be no sexual harassment or sexual solicitation of any customers. (110).

The policies indicate that the Town of Kittery must license all the attendants. (111). Dubois observed the signature of attendants on the policies and procedures. (113). Dubois observed and seized a license issued by the Town of Kittery.

Rodney Giguere, special agent with the Internal Revenue Service Criminal Justice Division, testified that his review of bank records for Kittery Health Club and K and D Realty Trust showed that the total amount paid to Gary Reiner and his law firm was just over $345,000.00 over a five and a half year period. (746). $632,000 was made payable to Reiner's client account for taxes for the estate of Joel Lehrer. (719). Agent Giguere testified that Reiner told him

that he [Reiner] became involved in some of the daily aspects of the club when Susan Lehrer became ill and was not able to handle the responsibilities. (724). Reiner picked up receipts, made the daily deposits, and forwarded mail to Mary Ann Maryanne Manzoli. (724, 725).

SUMMARY OF THE ARGUMENT

This Court should exercise its supervisory powers to examine the application of 18 USC § 982(a)(1) across the Circuits. The First Circuit applies a definition of the words "obtained" and "proceeds" that differs from that used in the Seventh Circuit. Because the First Circuit defines "obtained" to include temporary custody, and "proceeds" to mean gross, not net, Reiner was ordered to forfeit all of the money that came into the Club during the time of his involvement, although under the definitions applied by the Seventh Circuit – and pursuant to the dictates of reason – Reiner never actually possessed or gained that money.

The First Circuit found that all of the money that went through the Club during the course of the conspiracy was illegitimate. This was clearly against the weight of the evidence.

Reiner was punished for his decision to go to trial rather than plead guilty, and this punishment is reflected in the disparity between his sentence and those given to his co-defendants.

There was an overwhelming probability that juror 19 could not be an impartial juror after the prosecution

purposefully elicited two comments from a witness that spoke directly to juror 19's stated bias, and the exclusion of which had been a condition of juror 19's empanelment

ARGUMENT

I. The Forfeiture Order Conflicts With Both The Seventh Circuit And The Intention Of CAFRA, And Leads To An Absurd Result. *See United States v. Masters*, 924 F.2d 1362 (1991).

The First Circuit affirmed the lower court's forfeiture order against Reiner for $3,927,392.40 on Counts One and Two, and $581,310 on Count Three. In calculating these forfeitures, the district court and the First Circuit applied a definition of "obtained" that includes "temporary custody." *See United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995). Moreover, the forfeiture order against Reiner incorporated a definition of "proceeds" meaning gross revenue, not just profits. *United States v. Reiner*, No. 2:04-cr-00127-DBH, Order at 5 (Hornby, J., October 31, 2005).

As a result, Reiner, who actually gained $345,000, for legitimate legal work over a five and a half year period while he worked for the Club, was ordered to forfeit *all proceeds* generated by the Club. The First Circuit affirmed this forfeiture, which requires Reiner to disgorge proceeds that he never possessed

and which therefore cannot be considered "ill-gotten gains," in an amount far greater than his net worth

This Court must apply its supervisory powers to remedy the erroneous definition of "obtained" as set out in *Hurley* and applied in this case. Though the First Circuit acknowledged in *Reiner* that the petitioner's challenge to the *Hurley* reasoning "had merit" it nevertheless determined that it was bound by its previous flawed logic. *United States v. Reiner*, 500 F.3d 10, 18 (1st Cir. 2007).

Applied in this case, the *Hurley* reasoning resulted in the following forfeitures. Under count one (interstate prostitution conspiracy) and count two (the Travel Act) the district court determined that Reiner "obtained" proceeds amounting to $3,927,392.40. *See* 18 USC § 982(a)(1); 28 U.S.C. § 2461(c). The district court acknowledged that Reiner "only delivered the Club monies to the Bank, *and never had any right* to them." *Reiner*, No. 2:04-cr-00127-DBH, Order at 10, n. 16 (Hornby, J., October 31, 2005) (emphasis added). However, because the First Circuit defines "obtained" to include "temporary custody," and the district court determined that it was foreseeable to Reiner that *other* members of the conspiracy would reap the proceeds, Reiner was ordered to forfeit the entire amount of money taken in by the Club between August 23, 2000, and June 9, 2004. *See id.*

Reiner was additionally ordered to forfeit $581,310 under count 3, inducing Tara Morales to travel in interstate commerce to engage in prostitution, or aiding and abetting her pimp, or the Club itself, to

induce her to do so. Using this same definition of "obtained," the district court determined, and the First Circuit affirmed, that Reiner is responsible for the money Morales brought into the club *and* the $430,600 the court calculated that Morales generated as tips. *See id.*

In affirming the forfeiture order, the First Circuit placed form before function, stating, "regardless of the merits of Reiner's argument that holding him vicariously liable for the total amount of the conspiracy's windfall is unfair, we are bound by our decision in *Hurley*." *Reiner*, 500 F.3d at 18. In *Hurley*, the First Circuit conceded that it was a "difficult question" whether a money launderer who merely held money in custody before passing it along to the true owner should be considered to have "obtained" that money for the purposes of forfeiture responsibility. Resolving that question in the affirmative, however, *Hurley* found that "it is only in degree that the courier who gets a very small cut differs from intermediaries who get a larger one . . . [and] the size of the amount transported is some measure of the potential harm from the transaction."

The First Circuit renders the concept of forfeiture meaningless. Indeed, the definition of forfeiture is "[t]he loss of a right, privilege, or property because of a crime, breach of an obligation, or neglect of duty." BLACK'S LAW DICTIONARY, 289 (2nd Pocket Edition, 2001). In *United States v. Croce*, 334 F. Supp.2d 781 (2004), the United States District Court for the Eastern District of Pennsylvania stated, "Common sense notions and dictionary definitions of forfeit suggest that one cannot forfeit something that he

does not possess." Possession requires something more than "temporary custody." In the present case, the First Circuit applied *Hurley's* specious reasoning, despite the fact that Reiner's relationship to the money was not even for the purpose of money laundering. Instead, Reiner simply made bank deposits in the course of his legitimate representation of Maryanne Manzoli.

Moreover, the First Circuit's definition of "obtained" in isolation is contrary not only to logic and the Seventh Circuit, but also to the manner in which this Court has directed the Circuits to interpret statutory language.

> A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of a statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. United States Postal Serv., 546 U.S. 481, 126 S.Ct. 1252, 1257 (2006).

It is well established that reviewing courts must avoid interpretations that produce absurd results. *Rowland v. Cal. Men's Colony,* 506 U.S. 194, 200 (1993); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988); *Carpenters Dist. Council v. Dillard Dep't Stores,* 15 F.3d 1275, 1285 (5th Cir.1994) (citing *Birdwell v. Skeen,* 983 F.2d 1332,

1337 (5th Cir.1993)). This maxim also dictates that if a statute's language appears plain but leads to absurd results, the court should examine extrinsic interpretive aids. *Clinton v. City of New York,* 524 U.S. 417, 429 (1998); *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994); *Burns v. United States,* 501 U.S. 129, 135 (1991); *Pub. Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 454-55 (1989); *Green v. Bock Laundry Mach. Co.,* 490 U.S. 504, 509 (1989); *Am. Trucking Ass'ns, Inc. v. ICC,* 659 F.2d 452, 459 (Former 5th Cir. Oct. 1981) (citing *United States v. Am. Trucking Ass'ns,* 310 U.S. 534, 543-44 (1940)).

When the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) authorized the forfeiture of criminal proceeds, the intention was to deprive a wrongdoer of property that he had no right to possess in the first place. *See* Stefan D. Cassella, *The Civil Asset Reform Act of 2000,* 27 J.Legis. 97, 120 (2001). The concept of forfeiture, therefore, necessarily involves possession, and to require Reiner to forfeit that which he never possessed is the very type of absurd result that must be avoided.

Furthermore, the First Circuit's definition of "proceeds" to mean gross revenue, not just profits, directly contradicts the Seventh Circuit and, by implication, this Court. See *Russello v. United States,* 464 US 16, 22 (1983); *United States v. Masters,* 924 F.2d 1362 (1991). The *Masters* Court stated, "[t]he [forfeiture] statute is designed to force criminals to disgorge their ill-gotten gains." *Id.* at 1370. In defining what it means by "ill gotten gains," the *Masters* court states, ". . . it is proceeds received

by the *defendants*, not by their enterprise, that are forfeitable." *Id.* (emphasis added). Moreover, as intimated by this Court, the proceeds to which the statute refers are ". . . net, not gross, revenues – profits, not sales, for only the former are gains . . .." *Russello v. United States*, 464 US 16, 22.

The concept of "gain" is the gravaman to a lawful forfeiture, yet the First Circuit's definition of "proceeds" to mean "gross revenue, not profits" means that a defendant is required to forfeit much more than he or she ever gained. *See Hurley*, 63 F.3d at 21; *United States v. Iacaboni*, 363 F.3d 1, 4).

Requiring Reiner to disgorge proceeds he never possessed and amounting to a sum far, far greater than Reiner's net worth contravenes not only reason, but also holdings in the Seventh Circuit and dicta throughout the federal courts. *See United States v. Croce*, 334 F.Supp.2d 781, n. 23 (2004). To the extent that Reiner even handled any money that came into the Club, he did so only to avoid breaching his legal obligation as fiduciary of K and D Reality Trust.

No one disputes that Gary Reiner did not receive any proceeds from the enterprise in question; therefore, the forfeiture order in his case is in conflict with *Masters*. Proceeds were obtained by Maryanne Manzoli and the federal government. The federal government obtained $632,000 paid in estate taxes in addition other taxes that were collected. Because Reiner was ordered to forfeit gross revenues of the entire enterprise that he himself never obtained, this Court should exercise its supervisory powers to review the First's Circuit's application of CAFRA.

II. The First Circuit Did Not Distinguish Legitimate From Illegitimate Proceeds For The Purposes Of Determining Forfeiture. 18 U.S.C. 982(A)(1).

The First Circuit affirmed the forfeiture of $3,349,602.26 pursuant to the Count Seven conviction, finding that there was no distinction between the legitimate and illegitimate funds that came into the DHC. "The sole purpose of the DHC was prostitution, and income derived from activities designed to conceal the illegal nature of the enterprise are appropriately subject to forfeiture." *United States v. Reiner*, 500 F.3d 10, 7, 2007 (1st Cir. Me.).

This conclusion defies reason, where the DHC was undeniably licensed by the town of Kittery as a massage parlor and the employees were trained to give, and did in fact provide, massage services. Moreover, the DHC was equipped with a sauna and steam room, televisions and relaxation lounges. No one ever contended the sexual services were provided in these locations, and customers paid to use these legitimate services. Furthermore, the uncontroverted testimony at trial was that the prostitutes worked as independent contractors at the club, and when they allegedly provided sexual services they did so under privately negotiated agreements in direct contravention of the rules and regulations promulgated by Reiner. Accordingly, while the income that came into the club through the fees paid to the prostitutes could be considered illegitimate, there was no testimony that the fees paid by customers from the club were anything but

legitimate. The First Circuit therefore ignored clearly defined forfeiture law implicating the supervisory powers of this Court.

III. Reiner's Sentence Is Unreasonable Because He Was Punished For Exercising His Constitutional Right To Trial, Rather Than For The Conduct With Which He Was Charged.

Reiner asserted his 5th, 6th, and 8th Amendment rights, and as a result, he received a harsher sentence for similar or same conduct than did his co-defendants who waived those rights and plead guilty. Citizens are not equally protected under the law because punishment is inflicted not for charged conduct, but only for asserting those rights that are theoretically guaranteed by the constitution.

One aspect of the reasonableness of a sentence under *United States v. Booker,* 443 U.S. 220, (2005), is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C.A. § 3553(a)(6) Reiner's sentence was unreasonable in comparison to Maryanne Manzoli and Pallas and can be attributed only to unconstitutional arbitrariness in violation of due process and § 3553(a).

The vast disparity in their sentences is unreasonable because while Reiner was sentenced to 60 months in federal prison, Russell Pallas, who sat at the front desk of the Club, and who according to the government interacted with pimps and johns and prostitutes on a daily basis, was sentenced to only

one-tenth of that period of confinement. (Sentencing Transcript at 81). Moreover, Maryanne Manzoli, who owned the Club and who, according to the government, reaped a financial windfall by exploiting other women, was not confined for any period at all. *Id.*

Lance Williams and Cheryl Stillwell were the only individuals who received significant sentences – yet they were charged with and sentenced for an egregious crime involving minors. Moreover, Stillwell's sentence was less than one-half that given to Reiner. The Sixth Circuit has interpreted *Enmund v. Florida*, 458 U.S. 782 (1982), as establishing a principle that unconstitutional arbitrariness can be demonstrated through an evaluation of "a defendant's culpability both individually and in terms of sentences of co-defendants and accomplices *in the same case*." The Sixth Circuit noted that the principle of imposing punishment proportionate to co-defendants comparative culpability has "deep roots in our cultural and biological heritage" and has been encoded as part of the federal death penalty scheme. *See* 18 U.S.C. §3592(a)(4) (lack of death sentence for equally or more culpable co-defendants is mitigating factor).

While § 3553(a)(6)'s mandate to "avoid unwarranted sentence disparities" contemplates only national disparities, there are some cases in which consideration of state sentences may in fact help courts correctly apply the other factors set forth in § 3553(a). In addition to sentencing disparity, Congress also directs courts to assign sentences that

"reflect the seriousness of the offense," "promote respect for the law," "provide just punishment," and "afford adequate deterrence to criminal conduct." Where state law defines the federal crime, it is reasonable for the federal courts to evaluate the "seriousness" of the crime by considering how the state punishes that behavior. In fact, the Fourth Circuit addressed this issue in *United States v. Clark,* 434 F.3d at 689 (4th Cir. 2006) and held, "[c]oncerns about disparities among federal defendants are necessarily lessened [in such cases] because federal law intentionally incorporates variations in state law."

Booker and its progeny make it clear that the advisory guidelines sentence is whatever sentence is "sufficient but not greater than necessary" to achieve the statutory purposes of punishment, as required by 18 U.S. C. sec. 3553(a) in light of *Booker.* Reiner's 60 month sentence is "greater than necessary" under 18 U.S. C. sec. 3553(a) where the federal crime was defined by a state statute which itself was a misdemeanor. (123, 124).

Although Reiner's co-defendants took responsibility for their crimes by pleading guilty, and Reiner did not, this was only because the federal government made it impossible for him to plead guilty. Specifically, the government did everything possible to insinuate from the first indictment, through the superseding indictment, that Reiner was guilty of a crime that involved minors. However, Reiner was never charged with that crime. But because of the way the government presented the indictment, had he pled guilty to the crimes with which he was

actually charged, it would have appeared that he was pleading guilty to crimes involving children. Moreover, as an attorney, Reiner had both ethical obligations not to provide information that may have been privileged, and he had no one to cooperate against.

It cannot be maintained that the justification for a sentence is the seriousness of the offense, where Reiner was given a sentence six times harsher than that given to Russ Pallas, and infinitely harsher than that given to Maryanne Manzoli. Moreover, none of the patrons or the employees was charged. Furthermore Reiner received a $10,000 fine.

Reiner's treatment at the hands of the federal government demonstrates that people in this country are not punished for their supposed criminal behavior, but because they believe enough in the system to ask it to do what it was designed to do, and provide them with a fair trial on the charge. Because Reiner received a far greater sentence for conduct that was arguably less offensive than that of his co-defendants, who received little or no time in jail, the harshness of his sentence is not justified by a disparity in his conduct. Instead, his sentence was a disparity in the way the conduct was required to be proved that resulted in the differing sentences. This is inconsistent with the 5th, 6th, and 8th amendments.

Finally, at sentencing, Reiner presented the "fairly powerful mitigating reasons" the First Circuit looks for to establish that the "district judge was unreasonable in balancing pros and cons despite the latitude implicit in saying that a sentence must be

"reasonable." *United States v. Navedo-Concepcion*, 450 F.3d at 59 (1st Cir. 2006). As Judge Hornby noted at Reiner's sentencing, "It's a sad day when a pillar of the community is sent to prison. A man who has helped other families, young people when they are in trouble. He's been a good husband and good father and faced with tremendous challenges and pain and sadness in their lives." (Sentencing Transcript at 83). Reiner's sentence is so unreasonable when viewed in the context of his involvement in the crime that this Court should exercise its supervisory powers and remand the case for re-sentencing.

IV. There Was An Overwhelming Probability That Juror 19 Could Not Be An Impartial Juror After The Prosecution Purposefully Elicited Two Comments From A Witness That Spoke Directly To Juror 19's Stated Bias, And The Exclusion Of Which Had Been A Condition Of Juror 19's Empanelment.

The First Circuit so far departed from the accepted and usual course of judicial proceedings when it determined that the district court's instruction would cure a juror's stated prejudice that Reiner was denied his Sixth Amendment right to fair trial by an impartial jury. Juror 19 was seated on the condition that the government must avoid any mention of the involvement of minors in prostitution, and the government subsequently invited that very kind of testimony.

While it is generally presumed that a jury will follow a curative instruction, in this case it was simply

inconceivable that juror 19 could have followed the instruction because she had already told the court that she could not be impartial if exposed to the exact testimony the government then elicited. *See United States v. Sepulveda,* 15 F.3d 1161, 1185 (1st Cir. 1993); *Richardson v. Marsh*, 481 U.S. 200, 208 (1987); *Bruton v. United States*, 391 U.S. 123, 135 (1968).

The district court's ruling on a motion for a mistrial is reviewed for abuse of discretion. *United States v. Wihbey*, 75 F.3d 761, 773 (1st Cir.1996). In the present case, the First Circuit's decision affirming the lower court calls for this Court to exercise its supervisory power and remand the case for a new trial.

A mistrial is required where a jury is exposed to testimony so inflammatory that it is "...likely to prove beyond realistic hope of repair." *United States v. Sepulveda*, 15 F.3d 1161, 1184 (1st Cir.1993). A curative instruction will not suffice where the evidence is so volatile or inflammatory that it imputes extreme prejudice to the defendant. *United States v. Torres*, 162 F.3d 6, 12 (1st Cir.1998).

The defendant filed a motion *in limine* to preclude the government from eliciting testimony that a minor was transported to engage in prostitution. The district court denied that motion on the same grounds and at the same time that it also denied the defendant's Motion to Sever Counts Four, Five and Six of the Superseding Indictment. Counts Four, Five and Six were brought against co-defendants

who eventually reached plea agreements with the government and did not go to trial.

In his order denying both Reiner's Motion to Sever and Motion in Limine, the district court stated: "Ultimate determination of the risk of prejudice requires that I actually hear the evidence that is *material to the various counts.*" (emphasis added). Although at the time the motions were denied, evidence pertaining to the transportation of a minor for the purposes of prostitution was relevant to Counts Four, Five, and Six against co-defendants, by trial that evidence had no relevance whatsoever to any live issue since the defendants to those offenses had accepted pleas. As such, testimony relevant to Counts Four, Five and Six served merely to inflame the jury.

Moreover, at jury selection, juror 19 was seated over defense objection for cause after the government assured the court that there was no reason to anticipate testimony about the involvement of minors in prostitution. Specifically, during voir dire of juror 19 defense counsel asked: "If there was an overlap in the evidence between prostitution and sexual abuse, would that present a problem...?" (Voir Dire Transcript, "VT", at 153). Juror 19 responded:

> I don't know. I don't know that I can answer that question. **It might very well cause a problem just in the fact that it will stir up old emotions, feelings, and thoughts that have been laying there for a long time.**

(VT- 153)(emphasis added). Juror 19 further explained to the Court that she was troubled by the possibility of issues regarding minors and sexual conduct because of an instance where a friend was abused by a priest, and a second instance involving "a young cousin and a very close friend." (VT 153).

The Court then conducted a lengthy colloquy with counsel on this issue and the government offered assurances that because there were no charges involving minors against Reiner, there were no reason for concern about a juror who had expressed trepidation about minors and sex.

> Mr. Dilworth [for the government]: The defendant has a motion in limine, and Judge Hornby made it clear that if the two defendants who were charged with transporting a minor over state lines were no longer in the trial there would be no relevance to her age. (VT 154).
>
> . . .
>
> Mr. Dilowrth: ...Judge Hornby made it clear in his ruling in the motion in limine he wasn't going to entertain that sort of evidence. And we are not going to offer it because it is not an issue. Her age at the time she was transported is not an issue.

In reliance on the government's assurances the Court seated juror 19. (VT 181).

"We normally presume that a jury will follow an instruction to disregard inadmissible evidence **inadvertently** presented to it." *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987) (emphasis added). Here, the evidence was not inadvertently admitted. At trial, testimony about the transportation of minors for prostitution came into evidence twice, not once as the First Circuit states, even after the lengthy discussions about why it could not come in and assurances from the prosecution that it would not come in. Russell Pallas testified that one night after he had made a deposit at the bank, he returned to the club and Reiner was, "...waiting for me in the club parked facing the club at the middle stairs, and he asked me to get into his car. He said he had just finished a meeting with Lance, and that Lance said that we were being watched by the FBI from across the street, and it was originally based on a complaint of under-aged girls at the club." (216-217).

The defendant moved for a mistrial and his motion was denied. Denial of his motion for a mistrial violated Reiner's right to a fair trial because there was "a sufficient showing that the offending testimony reasonably could not have been ignored and that serious prejudice likely resulted." *United States v. Gonzalez-Vazquez*, 219 F.3d 37, 48 (1st Cir.2000) (quotations omitted). The district court struck the testimony from the record and gave a curative instruction. (218).

Further, Lance Williams testified over defense objections that he pled guilty to "aiding and abetting the interstate transportation of a minor to engage in prostitution." (406-414). Williams' testimony

established that he [Williams] was a pimp. (T-430). Moreover, Williams testified that he worked through Reiner to help his "girls" get jobs at the DHC: " ...when there was another girl that wanted to be hired, he [Reiner] would want to bring the girl up to his office so that he could talk to me about her and that he would interview her." (T430). In the context of Williams' testimony, the fact that the district court allowed the jury to hear the details about the charges he had pled guilty to, specifically that those charges included the transportation of underage girls for the purposes of prostitution, naturally would cause jurors to ponder the age of "girls" Reiner and Williams discussed.

The presumption that a jury will follow a curative instruction is defeated here because juror 19 said she could not follow such an instruction. She stated to the court, "[evidence about minors] might very well cause a problem just in the fact that it will stir up old emotions, feelings, and thoughts that have been laying there for a long time." (V- 153). Moreover, there is a strong likelihood that the evidence was devastating to the defendant because of this overwhelming probability that juror 19 could not follow the instruction. *Richardson*, 481 U.S. at 208.

The defendant testified on his own behalf that he legitimately represented Maryanne Manzoli on IRS and other legitimate matters. The sentencing Judge himself questioned what possible motive Reiner could have had to commit the alleged crimes. "I still can't figure out what went on in Mr. Reiner's mind. It surely couldn't have been for the legal fees. They weren't enough to risk family, reputation, profession,

freedom." (Sentencing Transcript at 85). Therefore, there was a probability that the jury might not have been convinced of the Reiner's motive or that the defendant acted with the intent to engage in prostitution, and a distinct probability Reiner was convicted because juror 19 could not be impartial in light of evidence of a crime that Reiner was not charged with.

When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important "as an initial matter to place the remark in context." *Darden v. Wainwright*, 477 U.S. 168, 179 (1988). In the present case, the statements about the involvement of minors in prostitution were made in the context of a trial about prostitution, so despite the curative instruction, the jury could not but view the defendant as someone who was pimping out children. Furthermore, in the context of the particular biases stated by juror 19, there is simply no possibility that she could have been impartial after hearing the testimony about minors.

CONCLUSION

For all of the foregoing reasons, this Court should reverse Reiner's conviction and order a new trial.

Respectfully Submitted,
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United States Court of Appeals,First Circuit.
UNITED STATES, Appellee,
v.
Gary H. REINER, Defendant, Appellant.
No. 06-1451.

Heard Feb. 8, 2007.
Decided Aug. 20, 2007.

Background: Defendant was convicted in the United States District Court for the District of Maine, D. Brock Hornby, J., of interstate travel to promote prostitution, inducement to interstate travel to engage in prostitution, conspiracy to violate the Travel Act and the Mann Act, and conspiracy to launder money, and was sentenced to 60 months' imprisonment, and he appealed.

Holdings: The Court of Appeals, John R. Gibson, Circuit Judge, held that:

(1) information omitted from Internal Revenue Service agent's affidavit in support of warrant to search business run by defendant was irrelevant;

(2) information in agent's affidavit in support of warrant was not stale;

(3) district court did not abuse its discretion in denying a mistrial after government witness mentioned under-age girls;

(4) district court did not plainly err in applying sentencing guidelines offense level increase for

multiple victims; and

(5) sentence was not unreasonable.

Affirmed.

*13 JOHN R. GIBSON, Circuit Judge.

Gary H. Reiner appeals his four count conviction for interstate travel to promote prostitution, 18 U.S.C. § 1952 (the Travel Act); inducement to interstate travel to engage in prostitution, 18 U.S.C. § 2422(a) (the Mann Act); conspiracy to violate the Travel Act and the Mann Act, 18 U.S.C. § 371; and conspiracy to launder money, 18 U.S.C. § § 1956(h) and 1957. Reiner argues that (1) the district court erred in refusing to hold a *Franks* [FN1] hearing concerning omissions in the affidavit supporting the search warrant; (2) the district court erred in denying Reiner's motion for a mistrial following prejudicial testimony; (3) the district court miscalculated Reiner's base offense level under the sentencing guidelines; and (4) the district court erred in ordering forfeiture. We affirm.

FN1. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Reiner was the attorney for Kittery Health Club, Inc., doing business as The Danish Health Club, Inc. ("DHC"), in Kittery, Maine. The DHC advertised itself as a massage parlor for men, but in reality it offered sexual services in exchange for money. Reiner performed legal services for the DHC's original owner, Leo Manzoli, dating back to 1990. Leo Manzoli died in 1996, and Joel Lehrer, a

business associate of his, took over the day to day operations of the DHC. Following Leo Manzoli's death, his wife, Mary Ann Manzoli ("Manzoli"), also took a more active role in the business. Joel Lehrer died in 2001, and some time thereafter Reiner became a co-trustee of K & D Realty Trust, which owned the property used by the DHC. Susan Lehrer, Joel Lehrer's widow, began to run the DHC in 2001, but was later relieved of her responsibilities by Reiner. Reiner then ran the DHC between 2001 and 2004. In 2001, Reiner hired Russell Pallas, a former police officer, to manage the front desk, and Reiner filled in for Pallas on occasion. Reiner was responsible for all personnel decisions concerning the female masseuses and handled the financial aspects of the business. In late 2003 and early 2004, the DHC ran advertisements in Xtreme Magazine, an adult periodical, and in the adult section of two alternative newspapers, the Portland Phoenix and the Boston Phoenix. Reiner was responsible for the content of the advertisements.

On June 9, 2004, authorities executed a search warrant at the DHC. Rodney Giguere, a Special Agent with the Internal Revenue Service, prepared a thirty-five page affidavit in support of the search warrant. The affidavit relied upon (1) police reports and reports by the Federal Bureau of Investigation detailing investigations of the club; (2) statements by several confidential witnesses concerning occurrences of prostitution at the DHC; (3) the adult advertisements placed by Reiner; (4) an internet search by another IRS agent that revealed detailed descriptions of sexual encounters at the DHC; and (4) reports as well as a first-hand account of

extensive visual surveillance conducted by the FBI. During the search authorities found numerous condoms located throughout the club. They also found a customer of the club on a massage table wearing a condom and a towel.

A grand jury indicted Reiner on April 27, 2005. Reiner filed a motion to suppress, which the district court denied. *United States v. Reiner*, 382 F.Supp.2d 195 (D.Me.2005). At Reiner's trial, the jury heard testimony from Pallas, who testified pursuant to a plea agreement with the government. At one point during his testimony, when asked about surveillance at the DHC, Pallas stated that he recalled a particular conversation with Reiner in ***14** which Reiner explained that he had learned of the surveillance by the FBI; it was apparently based upon complaints of under-age girls at the club. The defense objected immediately to Pallas's testimony and moved for a mistrial, which the district court denied. The district court instead struck the testimony from the record and gave a curative instruction. On September 30, 2005, the jury returned guilty verdicts.

In its presentence report, the probation office calculated a base offense level of nineteen. Reiner's violations provide for an original base offense level of fourteen under U.S.S.G. § 2G1.1(a), with a five level increase pursuant to U.S.S.G. § 2G1.1(d)(1) since the offense involved multiple victims. The presentence report calculated a total offense level of twenty-eight and a criminal history category of I, resulting in a guidelines range for imprisonment of seventy-eight to ninety-seven months.

At his sentencing hearing, Reiner did not object to the presentence report's adjustment for multiple victims, but did object to its adjustments for Reiner's leadership role in the organization, the involvement of a minor, and obstruction of justice for false testimony. Reiner also objected to the presentence report's asset calculation. The district court rejected the presentence report's adjustments for the involvement of a minor and for false testimony, resulting in a total offense level of twenty-four and a subsequent guideline range of fifty-one to sixty-three months. The district court sentenced Reiner to sixty months' imprisonment. The district court also determined that Reiner was responsible for $3,927,392.40 in proceeds to the DHC from the illegal activity described in counts I and II. On March 2, 2006, the district court ordered forfeiture in the amount of $3,927,392.40 as a money judgment. Reiner now brings the present appeal.

I.

[1] Reiner argues that the district court violated his Fourth Amendment rights by refusing to hold a *Franks* hearing and denying his motion to suppress evidence seized during the search of the DHC.

[2][3] We review the denial of a *Franks* hearing for clear error. *United States v. Nelson-Rodriguez*, 319 F.3d 12, 34 (1st Cir.2003). A defendant is entitled to an evidentiary hearing under *Franks* where the defendant "makes a substantial preliminary showing" that both (1) "a false statement knowingly and intentionally, or with reckless disregard for the

truth, was included by the affiant in the warrant affidavit" and (2) "the allegedly false statement is necessary to the finding of probable cause." *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Omission of a material fact from the affidavit supporting a warrant is sufficient to trigger a *Franks* hearing. *United States v. Castillo*, 287 F.3d 21, 25 (1st Cir.2002). In the case of an omission, "suppression should be ordered only if the warrant application, ... clarified by disclosure of previously withheld material, no longer demonstrates probable cause." *United States v. Stewart*, 337 F.3d 103, 105 (1st Cir.2003). Therefore, Reiner must make "a substantial preliminary showing" that, considering the previously withheld material, Giguere's affidavit fails to demonstrate probable cause, *Franks*, 438 U.S. at 155-56, 98 S.Ct. 2674, and that the district court's denial of his motion was clearly erroneous.

Reiner claims, and the government concedes, that Giguere's affidavit omitted decades-old information concerning previous *15 investigations of the DHC by authorities. Specifically, Giguere's affidavit neglected to explain that previous investigations occurring in the 1980s and 1990s failed to result in any prosecution or conviction of individuals associated with the DHC. Contrary to Reiner's argument, however, the previously withheld information does nothing to alter whether Giguere's affidavit demonstrates probable cause. The district court, because of concerns regarding staleness, examined "whether probable cause existed by looking primarily at the most recent relevant information and then the other information in the

context of the contemporaneous information." *United States v. Reiner*, 382 F.Supp.2d 195, 197-98 (D.Me.2005). The district court, therefore, relied primarily on the adult advertisements run by the DHC in 2003 and 2004, statements by confidential informants, the extensive cash deposits by the DHC through 2003, and the interstate nature of the DHC's business in its determination that probable cause existed. Thus, the omitted information was irrelevant, and the district court did not commit clear error in refraining from ordering a *Franks* hearing on the basis of such information. *See United States v. Rivera-Rosario*, 300 F.3d 1, 20 (1st Cir.2002) (holding that because the information omitted from the affidavit "was immaterial to the investigation," there was no error in denying defendant's motion for a *Franks* hearing).

[4] Ironically, after contending that the affidavit was misleading for failing to include material from the 1980s and 1990s, Reiner next argues that the information contained in the affidavit was stale and therefore could not support a showing of probable cause. Specifically, Reiner attacks the district court's reliance upon information from confidential informants detailing activity at the DHC between 2000 and 2002, which he claims is too old.

[5][6] Probable cause to issue a search warrant exists when "given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). "In determining the sufficiency of an affidavit

supporting a search warrant, we consider whether the 'totality of the circumstances' stated in the affidavit demonstrates probable cause to search the premises." *United States v. Beckett*, 321 F.3d 26, 31 (1st Cir.2003). Factors to be considered in determining whether an affidavit is stale include "the nature of the criminal activity under investigation and the nature of what is being sought." *United States v. Dauphinee*, 538 F.2d 1, 5 (1st Cir.1976).

In this case, especially in light of the nature of the criminal activity and the contraband sought, the affidavit did not suffer from staleness. Illicit prostitution operating under the guise of a legal and long-running business is precisely the type of criminal enterprise that would most likely be unchanged over the course of several years. Evidence cited by the affidavit that was two to three years old was overwhelming in this case and more than sufficient to establish probable cause. The information provided by confidential informants concerning illicit activity at the club between 2000 and 2002, corroboration of such activity through surveillance, an online description in 2000 of prostitution, extensive cash deposits through 2003, and the placement of adult advertising in 2003 and 2004 are all consistent with a prostitution ring of long duration. While "no hard and fast rule can be formulated as to what constitutes excessive remoteness," *id.*, we conclude that the district court was correct in disregarding investigations by authorities dating from the 1980s and 1990s, and ***16** instead relying on the more recent evidence submitted in the affidavit.

II.

[7] Next, Reiner argues that the district court erred in denying his motion for a mistrial following Pallas's statement regarding suspicions by authorities of under-age girls at the DHC. We review the denial of a motion for mistrial for an abuse of discretion. *United States v. Flecha-Maldonado*, 373 F.3d 170, 177 (1st Cir.2004). As is the case here, whenever "a curative instruction is promptly given, a mistrial is warranted only in rare circumstances implying extreme prejudice." *United States v. Torres*, 162 F.3d 6, 12 (1st Cir.1998).

Reiner contends that the testimony offered by Pallas was especially prejudicial in light of information given by juror nineteen. During voir dire, juror nineteen disclosed that she was close to two individuals who had suffered from sexual abuse. When asked whether her experiences would affect her impartiality, she stated the following:

I can tell you [that with] prostitution I have a clean slate, but with the sexual abuse, I don't know if it would bring up emotions that I hadn't planned on.... It might very well cause a problem just in the fact that it will stir up old emotions, feelings, and thoughts that have been laying [sic] there for a long time.

Reiner cites two cases in his argument that Pallas's statement was so inflammatory that a mistrial was warranted even in light of the curative instruction given by the district court. First, Reiner relies on *United States v. Fulmer*, 108 F.3d 1486, 1497-98 (1st

Cir.1997), where we held that admission of statements by an FBI agent as well as the prosecutor concerning the Oklahoma City bombing constituted reversible error because the bombing was unrelated to the defendant's alleged conduct. Second, Reiner relies on *United States v. Lehder-Rivas*, 955 F.2d 1510 (11th Cir.1992). In that case, the court held that admission of evidence that the defendant planned to mark packages of cocaine with swastikas constituted an abuse of discretion. *Id.* at 1518. The court, however, then held that the swastika testimony was harmless beyond a reasonable doubt. *Id.* at 1518-19.

Even considering juror nineteen's answers at voir dire, neither of these cases provides much support for Reiner's contention that the district court erred in refusing to declare a mistrial. Both cases involved extensive testimony of a highly inflammatory nature that was only tangentially related to the charges faced by the defendants. As well, in neither case did the district court strike the testimony or give a curative instruction. In this case, however, Pallas testified to one statement Reiner allegedly made that authorities suspected there were under-age girls at the DHC, which the district court immediately struck. There is no reason to believe that an isolated comment by Pallas about under-age girls constitutes the kind of "extreme prejudice," *Torres*, 162 F.3d at 12, that would warrant a mistrial. The district court gave an appropriate and prompt curative instruction, which we presume all jurors will follow. *See United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir.1993). Reiner has not rebutted that

presumption, and we conclude that the district court did not abuse its discretion in denying his motion for a mistrial.

III.

[8] Reiner raises two issues concerning his sentence. First, Reiner contests the district court's calculation of his base offense level. Because Reiner did not previously object to the district court's calculation of multiple victims, we review the district court's finding for plain error. *See United States v. Terry*, 240 F.3d 65, 72-73 (1st Cir.2001).

*17 Reiner cites *United States v. Camuti*, 950 F.2d 72 (1st Cir.1991), to argue that because there was no evidence that Reiner himself transported any of the victims at the DHC, the five-level increase to his base offense level is clearly erroneous. This argument is without merit. In *Camuti*, we held that providing motivation for travel was insufficient to constitute an offense involving the transportation of an individual, and therefore insufficient to trigger the sentencing enhancement provided by U.S.S.G. § 2G1.1(c) (1990). 950 F.2d at 77. Reiner's case, however, is governed by the 2005 edition of the United States Sentencing Guidelines Manual; considering the differences between the two editions, the decision in *Camuti* is inapposite.[FN2]

FN2. Typically, a sentencing court must use the edition of the guidelines manual effective on the date of sentencing. *See United States*

v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir.1990) ("Barring any *ex post facto* problem, a defendant is to be punished according to the guidelines in effect at the time of sentencing."); U.S.S.G. § 1B1.11.

In this case, Reiner should have received an enhancement under the guidelines if "the offense involved more than one victim." U.S.S.G. § 2G1.1(d)(2005). The commentary explains that for the purpose of calculating multiple victims, "each person transported, persuaded, induced, enticed, *or* coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim." U.S.S.G. § 2G1.1, cmt. n. 5 (emphasis added). Reviewing the evidence, we conclude that the district court did not commit plain error in determining that the offense involved five or more victims. Reiner ran the DHC, and there is ample evidence that most of the women involved in the DHC either traveled or were transported, persuaded, induced, or enticed for the purpose of engaging in a commercial sex act.[FN3]

FN3. Reiner also contests the district court's conclusion regarding his leadership role in the DHC. In light of Reiner's extensive involvement with the DHC detailed thus far, we conclude that the district court's determination was not clear error, *see United States v. Ventura*, 353 F.3d 84, 89 (1st Cir.2003), and Reiner's argument is wholly without merit.

[9] Second, Reiner offers several arguments as to why his sentence is unreasonable. First, he argues that, although his sentence is within the guideline range, it is nevertheless unreasonable because the district court failed to consider Reiner's obligations to his family as well as his history as an "exceptional person." Under *United States v. Booker*, 543 U.S. 220, 245-46, 259-60, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the district judge may adopt a non-guideline sentence where appropriate in consideration of 18 U.S.C. § 3553(a) (2000). Assuming that such factors are properly understood, our review of the district court's judgment is deferential. *See United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir.2006) (en banc), *cert. denied*, --- U.S. ----, 127 S.Ct. 928, 166 L.Ed.2d 715 (2007).

In this case, the district court noted all of the relevant circumstances concerning Reiner and his family. He observed that Reiner's family "has confronted severe medical issues." He also noted that "[i]t's a sad day when a pillar of the community is sent to prison." The district court nevertheless chose to sentence Reiner to sixty months' imprisonment, stating that such a sentence was necessary to achieve the objectives set forth in 18 U.S.C. § 3553(a)(2)(A). Where, as here, there is "a plausible explanation and a defensible overall result," we normally respect the judgment of the district court as to whether to go outside of the guidelines. *Jiménez-Beltre*, 440 F.3d at 519. Considering all of the circumstances surrounding ***18** Reiner's case, including his familial responsibilities and his previous history as an upstanding citizen, we see no basis for disturbing the

district court's judgment.[FN4]

> FN4. Reiner also argues that the district court erred in refusing to depart downward pursuant to U.S.S.G. § 5H1.6. Such a refusal to depart, however, is not ordinarily reviewable by this court absent a mistake of law. *United States v. Melendez-Torres*, 420 F.3d 45, 50-51 (1st Cir.2005).

Reiner also argues that the district court's sentence is unreasonable due to an unwarranted sentence disparity in light of the six month sentence received by Pallas and the five years of probation received by Manzoli. As Reiner acknowledges, however, we have stated before that "the aim [of reducing unwarranted disparity] was almost certainly a *national* uniformity focusing upon a common standard." *United States v. Saez*, 444 F.3d 15, 18 (1st Cir.) (emphasis in original), *cert. denied*, --- U.S. ----, 127 S.Ct. 224, 166 L.Ed.2d 178 (2006).

Also problematic for Reiner is that, as the district court noted, both Manzoli and Pallas accepted responsibility for what they had done and then cooperated with the government. Reiner, however, asserted both at trial and at his sentencing hearing that he was not guilty of the charges against him. Reiner cites our decision in *United States v. Thurston*, 456 F.3d 211 (1st Cir.2006), *petition for cert. filed*, No. 06-378 (Sept. 14, 2006), to argue that he is still similarly situated to Pallas and Manzoli, but his reliance is misplaced. In *Thurston*, we specifically noted that a defendant who chooses to

enter into a plea bargain is not similarly situated to a defendant who contests the charges. *Id.* at 216-17. It is therefore not the case that the district court was "required to reduce [the appellant's] sentence simply because he-unlike the other defendants-chose to go to trial." *United States v. Navedo-Concepción*, 450 F.3d 54, 60 (1st Cir.2006).

Reiner argues that the district court's sentence violated the parsimony principle-the statutory directive that sentences ought to be no higher than is necessary to achieve the objectives of sentencing. We have held before that it is "the rare case in which a within-the-range sentence can be found to transgress the parsimony principle." *United States v. Turbides-Leonardo*, 468 F.3d 34, 41 (1st Cir.2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 3064, --- L.Ed.2d ---- (2007). Upon review of the sentencing transcript, it is evident that the district court was careful in fashioning an appropriate sentence. There is no basis for concluding that Reiner's sentence violates the parsimony principle or is otherwise unreasonable.

IV.

Finally, Reiner contests the forfeiture award ordered by the district court. We review questions of law *de novo*, but we review mixed questions of fact and law for clear error. *See United States v. Ferrario-Pozzi*, 368 F.3d 5, 8 (1st Cir.2004).

Our analysis of Reiner's claim need not detain us long. First, Reiner urges us to reconsider our holding in *United States v. Hurley*, 63 F.3d 1 (1st

Cir.1995). In that case, we held that the principle of finding members of a conspiracy substantively liable for the foreseeable conduct of other members of the conspiracy extended to forfeiture rules. *Id.* at 22. Reiner argues that the district court erred by ordering him to pay the full value of the DHC's proceeds when he never used or personally possessed the money. However, regardless of the merits of Reiner's argument that holding him vicariously liable for the total amount of the conspiracy's windfall is unfair, we are bound by our decision in *Hurley*. *See United States v. Malouf*, 466 F.3d 21, 26 (1st Cir.2006) (noting that, ***19** except for circumstances not present here, "newly constituted panels are bound by decisions of prior panels in the same circuit"), *cert. denied*, --- U.S. ----, 127 S.Ct. 1892, 167 L.Ed.2d 365 (2007).

Reiner also contests the district court's determination that all of the DHC's proceeds were subject to forfeiture because the entire enterprise functioned as nothing more than a front for illegal prostitution. Reviewing the record, we conclude that the district court's determination regarding the nature of the DHC is not clearly erroneous. The sole purpose of the DHC was prostitution, and income derived from activities designed to conceal the illegal nature of the enterprise are appropriately subject to forfeiture.

V.

We affirm the judgment of the district court in all respects.

UNITED STATES DISTRICT COURT DISTRICT OF MAINE UNITED STATES OF AMERICA

CRIMINAL NO. 04-127-P-H-01

GARY H. REINER,
DEFENDANT

MEMORANDUM IN SUPPORT OF PRELIMINARY ORDER OF FORFEITURE

I have previously ruled that Gary Reiner has no right to jury trial on the government's request for an *in personam* money judgment of forfeiture. United States v. Reiner, No. 2:04cr127-01, ___ F. Supp.2d ___, 2005 WL 2542625 (D. Me. Oct. 12, 2005). Here, I make my findings of fact and conclusions of law determining the amount of the money judgment. See Fed. R. Crim. P. 23, 32.2(b)(1).

I. PROCEDURAL BACKGROUND

On September 30, 2005, a jury convicted Reiner of an interstate prostitution conspiracy (Count 1);[1] violation of the Travel Act (Count 2)[2]; inducement of interstate travel to engage in prostitution (Count 3);[3] and conspiracy to commit money laundering (Count 7).[4] At the end of the trial, the government narrowed its requested forfeiture relief to a personal money judgment against Reiner—in the words of the

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[1] 1 18 U.S.C. §§ 371, 1952, 2421, and 2422

[2] 18 U.S.C. § 1952.

[3] 3 18 U.S.C. § 2422(a).

[4] 18 U.S.C. §§ 1956(h), 1957

Superseding Indictment, a "sum of money equal to the total amount of money [Reiner] obtained as proceeds from" the offenses for Counts 1, 2, and 3,[5] and a "sum of money equal to the total amount of money involved in" the conspiracy offense for Count 7.[6] At a post-verdict forfeiture hearing on September 30, 2005, I invited both sides to present evidence on the forfeiture issues. The government called one witness—Internal Revenue Service Agent Giguere—and submitted three exhibits. The exhibits summarized the methodology Agent Giguere used to calculate the amounts the government is seeking. Reiner's lawyers called no witnesses and objected to the admission of one exhibit that corresponded to the forfeiture request for Count 3. I adjourned the hearing, allowing the parties to confer and the defendant to determine whether he wished to put on additional evidence and/or argument based upon the Kittery Health Club, Inc.'s[7] records (at least some of which had been admitted at trial). On October 14, 2005, I held an on-the-record telephone conference with the lawyers to ascertain whether there was going to be additional evidence, and whether there was a need for any further briefing of the legal

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[5] Superseding Indictment ¶¶ 9(b), 10(c). 9 The beginning date for Counts 1 and 2 is the effective date of 28 U.S.C. § 2461(c), first allowing the government to seek forfeiture criminally rather than just civilly for certain crimes. See 28 U.S.C. 2461(c) Historical and Statutory Notes, Effective and Applicability Provisions ("Amendments by Pub. L. 106-185 (adding subsection c)" are "applicable to any forfeiture proceeding commenced on or after the date that is 120 days after April 25, 2000."). The money laundering crime (Count 7) has no comparable date limitation for criminal forfeiture

[6] Superseding Indictment ¶ 11(b).

[7] d/b/a/ the Danish Health Club, hereinafter the "Club."

issues. All the lawyers agreed that there was no need for additional evidence and that they had fully briefed the legal issues.[8] The government explained the differing start dates used in its calculations of

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[8] To my surprise, following the telephone conference, Reiner filed a document that included two objections suggesting that I had denied an evidentiary hearing. Defendant's Objection to [the Government's Proposed] Preliminary Order of Forfeiture (Docket Item 170). Consequently, on October 24, 2005, I filed a Procedural Order (Docket Item 171) in which I ordered Reiner to "either withdraw the objections or make a proffer of the testimony of specific witnesses and/or 2exhibits that he believes I have prevented him from presenting." In Reiner's response to this order on October 26, 2005 (Docket Item 173), his lawyers repeated my own synopsis that "[a]t the bench hearing, the parties agreed that there were only legal—and no factual—disputes as to the forfeiture allegations connected to Counts 1, 2, and 7," and that, just as I understood it, the "parties agreed that although factual disputes as to the amount of forfeiture on Count 3 still existed," they were not going to present any additional evidence because the amount of forfeiture under Count 3 was so much less than that under the other three counts, and there would be only one forfeiture judgment. Defendant's Memorandum in Response to the Court's October 24, 2005 Procedural Order ¶¶ 3, 4. The evidentiary record, therefore, was closed as of October 14, and Reiner waived any right to present additional evidence on Counts 1, 2, 3 and 7, notwithstanding the fact that his lawyers then went on to enumerate additional evidence that they would present "[i]f the Court requires additional testimony or evidence to make the determination as to the amount of the forfeiture on Count 1." Id. ¶ 6. (Frankly, I do not understand this latter statement. It is the parties' role to decide what evidence to present. The burden of proof is on the government to establish the amounts it seeks to forfeit. My role is to determine whether the government has met its burden of proof, not to instruct the defendant whether to present more evidence.) Finally, Reiner's lawyers assert that Reiner "preserved the issue that he is entitled to a set off on the outstanding forfeiture obligation based upon estate taxes paid to the federal government." Id. ¶ 7. I am aware of no basis for any such setoff.

the forfeiture amounts for the Count 1 conspiracy (August 23, 2000) and the Count 7 conspiracy (January 4, 1999).9 Reiner's lawyers responded that they believed the dates used by the government were "correct." I asked for clarification of what they meant by "correct." Reiner's lawyers responded that if I should find Reiner responsible, the dates are proper in light of the government's explanation that (1) the beginning date for forfeiture calculations under Counts 1 and 2 is determined by the statute's effective date, and (2) the beginning date for forfeiture calculations under Count 7 is determined by the available bank records. The parties still requested that I make a factual finding on the amount of forfeiture for Count 3.

The only question that remains, then, is the amount of forfeiture to order on each count. According to Fed. R. Crim. P. 32.2(b)(1): "If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay."

II. ANALYSIS

(A) Count 1

The government asserts that Reiner obtained $3,927,392.40 in proceeds under the interstate prostitution conspiracy conviction. 18 U.S.C. § 371. See Superseding Indictment ¶ 9(b); Gov't Ex. F-1. "Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' . . . or a conspiracy to commit such [an] offense" is subject to civil forfeiture. 18 U.S.C. § 981(a)(1)(C). If it is subject to civil forfeiture, it is also subject to criminal forfeiture, 28 U.S.C. § 2461(c), the relief the

government requests here. In United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999), the First Circuit specifically approved money judgment forfeitures as one of "several forms" a criminal forfeiture can take, rather than limiting forfeiture relief to specific property or traceable proceeds.[9] Interpreting a "proceeds" forfeiture statute much

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[9] Nevertheless, I am aware that the Advisory Committee Note pointedly raises a caution: "A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings." Fed. R. Crim. P. 32.2 Advisory Committee Notes (2000 Rule Adoption). Indeed, the statutes involved in this case are comprehensive in their treatment of forfeiture of specified property or traceable proceeds. There is, therefore, some question as to why any additional forfeiture remedy should be recognized. See United States v. Croce, 334 F.Supp.2d 781, 794 n.23, 795 (E.D. Pa. 2004) (concluding that although the government remains entitled to the forfeiture of specific property involved in the underlying offense under 18 U.S.C. § 982, the court would not permit a nonspecific and unlimited forfeiture money judgment to "haunt the defendants for the rest of their lives:" "[W]e are not persuaded by [the decision in Candelaria-Silva]" because the First Circuit "offers no authority (*c* or reasoning to support its assertion, suggesting that it simply assumed that the Government was entitled to a forfeiture money judgment without carefully considering the question"), adhered to on reconsideration, 345 F. Supp.2d 492, 497 (E.D. Pa. 2004). Obviously, as a trial judge within the First Circuit, I follow Candelaria-Silva unless and until the First Circuit overrules it. 11 In Candelaria-Silva, the court was interpreting 21 U.S.C. § 853, the criminal forfeiture provision of the Controlled Substances Act. Section 853(a)(1) directs forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." Similarly, the forfeiture statute here, 18 U.S.C. § 981(a)(2), applies to "proceeds," defined as "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture" (applicable to criminal forfeiture through 28 U.S.C. § 2461(c)).

like that for Count 1,11 the First Circuit held that "the government is entitled to an *in personam* judgment against the defendant for the amount of money the defendant *obtained as proceeds* of the offense." Id. (emphasis supplied). The First Circuit has made clear that "proceeds" means gross revenue, not just profits. United States v. Hurley, 63 F.3d 1, 21 (1st Cir. 1995) ("[T]he broader definition of 'proceeds' seems to us a rather easy call"); United States v. Iacaboni, 363 F.3d 1, 4 (1st. Cir. 2004) ("We have previously rejected Iacaboni's interpretation of the term 'proceeds' [as net profits] in the RICO forfeiture context. Iacaboni has offered no rationale for abandoning that approach here [for forfeiture under 18 U.S.C. § 982(a)(1).]") (internal citation omitted). The question for me in deciding the Count 1 forfeiture, therefore, is what amount the government has established that Reiner "obtained as proceeds" from his violation of the Count 1 interstate prostitution conspiracy offense. See Candelaria-Silva, 166 F.3d at 42. In United States v. Hurley, the First Circuit held that proceeds are "obtained" by a defendant even "when it has merely been held in custody by that individual and has been passed along to its true owner." 63 F.3d at 21.

The standard of proof for the Count 1 forfeiture, based upon 28 U.S.C. § 2461(c), is preponderance of the evidence. Section 2461 incorporates all the procedural sections of the Controlled Substances Act, 21 U.S.C. § 853 (other than subsection (d) relating to rebuttable presumptions created at trial in narcotics cases). The First Circuit has held that the standard of proof for forfeitures under section 853 is preponderance of the evidence. United States v.

Keene, 341 F.3d 78, 85-86 (1st Cir. 2003) (refusing to apply the burden of proof requirements of Apprendi v. New Jersey, 530 U.S. 466 (2000), to criminal forfeitures, and holding that the preponderance "evidentiary standard used to impose the forfeiture was proper") (citing United States v. Rogers, 102 F.3d 641, 647 (1st Cir. 1996) (observing with approval that "almost every circuit that has pronounced on the issue has held the standard of proof as to forfeiture issues under section 853 . . . is a preponderance of the evidence."). I therefore apply that standard to section 28 U.S.C. § 2461(c). IRS Agent Giguere testified that he derived the government's requested forfeiture amount for Count 1 by calculating the total deposits going into the Club's Ocean National Bank Business Operating Account. See also Gov't Ex. F-1. He limited his calculations to the time period between August 23, 2000, the effective date of 28 U.S.C. § 2461(c), and June 9, 2004, the date federal agents raided and shut down the Club. Reiner has not challenged the accuracy of Giguere's calculations. What Reiner *does* challenge is the assertion that these deposits are all proceeds of illegal activity. I reject the challenge. The purpose of this so-called "health club" was prostitution. The deposits all derived from cash and credit card sales from the Club's operations, or payments by the prostitutes to the Club for the privilege of working there—all illegal proceeds. The overwhelming evidence established that customers, mostly from out of state, paid a $70 entrance fee (either in cash, or by credit card payments, stipulated at trial to have been transferred via interstate channels). Then they proceeded to a lounge area to select one of several available

"attendants." The customer and the attendant next went to a private room where they negotiated payment—in the form of a cash tip paid directly to the attendant—for sexual favors. The fact that a few customers were content to have only a massage does not alter the overall purpose of the operation. The massage "licenses" the attendants obtained and their skimpy "training" in the art of massage,[10] just like the Club's seemingly legitimate locker room, whirlpool, spa, and entrance fee, were all just a front so that the health club could remain open as a house of illegal prostitution. The Club's highly sexually suggestive advertisements strongly support this conclusion. Testimony at trial revealed that Reiner had a role in the hiring and licensing of the attendants, nearly all of whom lived out of state and traveled to the Club daily to engage in prostitution; that Reiner met and spoke regularly with their pimps, including Lance Williams, particularly when customers complained about a prostitute; and that Reiner worked with others at the Club to design an advertising scheme targeted specifically at drawing more out-of-state customers. Based on this and other

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[10] The government established at trial that a Kittery Town Ordinance required the attendants to obtain massage licenses and required massage training as a prerequisite, but that in fact the attendants obtained their diplomas by paying a fee without actually attending massage school for the required number of hours. The massage "school" was set up by someone that Reiner introduced to Leo Manzoli, the original owner of the Club. (After Manzoli died in 1996, ownership and management of the Club passed to Joel Lehrer; after Lehrer died on October 29, 2001, ownership of the Club passed to his wife, Susan Lehrer, and management of the Club soon passed on to Reiner).

evidence presented at trial, the jury found beyond a reasonable doubt that Reiner knowingly and willingly conspired with Lance Williams, Cheryl A. Stilwell, the Club, and others to use interstate commerce facilities to promote prostitution, to transport persons in interstate commerce with the intent that they engage in prostitution, and/or to induce and entice persons to travel in interstate commerce to engage in prostitution. In short, the interstate prostitution conspiracy for which Reiner was convicted was the "cause in fact" of the acquisition of the deposited Club funds. They "would not have been acquired or maintained but for the defendant's [and his co-defendant's]" illegal activities United States v. Angiulo, 897 F.2d 1169, 1213 (1st Cir. 1990).[11] The First Circuit has held that conspirators are vicariously liable for the foreseeable criminal conduct of their co-conspirators and therefore can be required to forfeit proceeds that other members of the conspiracy foreseeably reap. Hurley, 63 F.3d at 22-23 (co-conspirators are vicariously liable for a $136 million RICO forfeiture) (citing Pinkerton v. United States, 328 U.S. 640, 646-47 (1946)); see also Candelaria-Silva, 166 F.3d at 43 (participants in a drug conspiracy are jointly and severally liable for forfeiture of the full amount of the proceeds); United States v. White, 116 F.3d 948, 951 (1st Cir. 1997) (forfeiture of property that is fruit of drug-related criminal activity is not limited to proceeds defendants personally obtained; rather, defendants are jointly and severally liable for proceeds obtained by their coconspirators). "The

[11] The fact that Reiner or his law firm may ultimately have received some of these funds in payment for legal services is irrelevant.

government can collect [the total amount subject to forfeiture] only once but, subject to that cap, it can collect from any [co-conspirator] so much of that amount as was foreseeable to that [co-conspirator]." Hurley, 63 F.3d at 23. [12]Therefore, on Count 1, the interstate prostitution conspiracy count, I conclude that the government has met the forfeiture requirements, laid out by the First Circuit in Hurley and Candelaria-Silva, for all the Club revenues once Reiner joined the conspiracy. These receipts—proceeds of the Count 1 interstate prostitution conspiracy offense—were foreseeable to Reiner. Although Reiner argues that he should not be liable for any amounts the Club collected before Joel Lehrer (the former owner and day-to-day manager of the Club) died on October 29, 2001, that date merely marks the beginning of Reiner's personal role in deposits and withdrawals. (Soon after October 2001, Reiner personally deposited the Club's revenues into its Operating Account at Ocean National Bank. See Gov't Ex. F-1.) But the conspiracy and Reiner's membership in the conspiracy went back to at least the beginning date for which the government seeks forfeiture, August 23, 2000.[13] Reiner "obtained" the

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[12] Hurley explained: "It is largely fortuitous whether an individual co-conspirator happened to possess the laundered funds at a particular point. If conclusive weight were given to who physically handled the money, a low-level courier or money counter could be liable for vast sums, while other higher level conspirators could easily escape responsibility. So long as the amount handled by others is foreseeable as to a defendant, the foreseeable amount represents the sounder measure of liability." Id. at 22. 15

[13] I find by a preponderance of the evidence that Reiner joined this conspiracy long before August 23, 2000. Evidence and testimony at trial established that in his relationship with the

Club proceeds at the latest when he or one of one of his co-conspirators deposited them into the Club bank account during the time period established by the government (August 23, 2000, to June 9, 2004). See Hurley, 63 F.3d at 21 (finding "obtained" to mean no more than "temporary custody").[14] Indeed,

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customer complaints, and complaints by the women who worked at the Club. Additionally, evidence admitted at trial established that Reiner was involved with disputes between a customer and a "masseuse" prior to Joel Lehrer's death. See Gov't Ex. 109 (legal bill from February 7, 2001 listing "Telephone call from Susan Lehrer; re: argument between customer and masseuse; Travel to club; Discussion with customer; Discussion with masseuse; Discussion with witnesses; Discussion with Susan; Telephone call with Joel"). Exhibits admitted at trial also established that Reiner was involved with day-to-day management and employment issues at the club prior to Joel Lehrer's death. See, e.g., Gov't Ex. 106 (legal bill from March 19, 2001 listing "Telephone conference. With Joel Lehrer re: reception desk coverage and scheduling difficulties with staff"); Gov't Ex. 109 (legal bill including Jan. 29 1999: "Telephone call with Joel . . . travel to club re: applications for two masseuses"). .

[14] Admittedly, Reiner only delivered the Club monies to the Bank, and never had any right to them. However the Hurley court, "[l]ooking at criminal forfeiture . . . as a kind of shadow fine," id., broadly swept into its analysis the mere courier who had no more right to the drugs than Reiner had to the monies he deposited Club and its owners, Reiner was not merely acting as a lawyer counseling a client on the legal consequences of a proposed course of conduct. Rather, Reiner was assisting his client, with willful blindness if not more, in thwarting the law. See Model Rules of Prof'l Conduct R. 1.2(2) (2002) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"). Russell Pallas testified that Reiner met with pimps in April of 2000, well before Lehrer's death. See also Gov't Ex. 109 (legal bills indicating Reiner's meeting with pimps on April 10, 2000 and Reiner's conference with "Joel [Lehrer] and three

since the Club itself was a co-conspirator, Reiner obtained the illegal proceeds within the meaning of Hurley when the Club received them. I conclude, therefore, that the government is entitled to $3,927,392.40 as the total amount in proceeds that Reiner obtained from the Count 1 conspiracy offense.

(B) Count 2 Count 2, the Travel Act conviction (using interstate commerce facilities to carry on prostitution or aiding and abetting that conduct), does not charge a conspiracy. The government nevertheless seeks forfeiture in the same amount as Count 1 ($3,927,392.40). See Gov't Ex. F-1. It claims that these are the total proceeds Reiner obtained from violating the Travel Act or aiding and abetting Lance Williams, a pimp who supplied attendants for the Club, and/or Cheryl A. Stilwell, a prostitute who worked for Williams at the Club, and/or the Club itself. As described above, Reiner argues that he was not personally involved in the Club's revenue collections until at least after Lehrer died October 29, 2001. But I conclude that the First Circuit principles of vicarious liability for forfeiture by coconspirators extend equally to an aider and abettor. At the very least, Reiner aided and abetted the Club in generating its illegal revenue from interstate travel to engage in prostitution (the

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gentlemen from Boston with employment issues" on April 11, 2000). Cheryl Vinton, a prostitute at the club, testified that prior to Joel Lehrer's death, Reiner attended approximately fifty percent of the mandatory meetings for all of the women who worked at the club where they discussed issues such as problems with the attendants overcharging customers and cutting sessions short, the attendants' attire, the Club's rules and regulations (such as being on time and fines).

Travel Act violation) throughout the relevant time period. I find, therefore, that the government is entitled to the same amount of forfeiture on Count 2 as on Count 1, $3,927,392.40.[15] *(C) Count 3* With respect to Count 3, the government seeks a personal money judgment against Reiner for $745,200 for his conviction under 18 U.S.C. § 2422(a). See Superseding Indictment ¶ 10(c); Gov't Ex. F-2. Under 18 U.S.C. § 2253(a) "[a] person who is convicted of an offense under . . . [18 U.S.C. §] 2422 . . . shall forfeit to the United States such person's interest in" "any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense." Amounts are subject to forfeiture if the "trier of fact determines, *beyond a reasonable doubt*, that such property is subject to forfeiture." 18 U.S.C. § 2253(e) (emphasis supplied). At the telephone conference, the government agreed that proof beyond a reasonable doubt is the standard for forfeiture relief on Count 3. On Count 3, the jury convicted Reiner of inducing Tara Morales to travel in interstate commerce to engage in prostitution, or aiding and abetting her pimp, Lance Williams, or the Club itself, to induce her to do so. There are two components to the government's forfeiture request under this count: the tips that Tara Morales earned from sexual favors and gave to her pimp Lance Williams; and the Club's direct receipts from Tara Morales's customers. IRS

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[15] The forfeiture in Count 2 is based upon 28 U.S.C. § 2461(c). As explained in Count 1, supra, I conclude that the standard of proof for forfeitures based upon 28 U.S.C. § 2461(c) is a preponderance of the evidence. I discuss aider and abettor forfeiture liability further under Count 3, infra.

Agent Giguere generated the government's $745,200 forfeiture number. He testified that he "extrapolated" the amount from three figures presented to the jury: (1) the total number of months Tara Morales testified that she worked at the Club (Agent Giguere calculated 34-½ months); (2) the average number of customers she saw per day (according to Agent Giguere, 4 to 5 customers per day, 20 per week, 80 per month); (3) the average amount she earned in tips per session ($200, according to Agent Giguere). Agent Giguere explained that he multiplied the Club's standard entrance fee ($70) by the number of customers Tara Morales "presumably" saw during her employment (2,760 customers18) to get a total of $193,200. He calculated Tara Morales's tip revenue as $552,000 by multiplying the postulated number of her customers (2,760) by her average tip ($200). Together these two numbers yielded $745,200. As to the Club's receipts, uncontradicted evidence showed that during Morales's employment, Reiner took custody of all the Club's receipts and deposited them in the Club's Business Operating Account at the Ocean National Bank. Clearly, therefore, the Club's receipts for patrons with whom Morales illegally exchanged sex for money were "obtained by" Reiner. He held them in temporary custody and passed them along, sufficient for forfeiture under Hurley, 63 F.3d at 21. Alternatively, he aided and abetted the Club in generating the illegal revenues. On the other hand, the evidence does not support the assertion that Reiner "obtained" the tips that Tara Morales earned. Instead, she gave these amounts directly to her pimp, Lance Williams; Reiner never touched them. Any forfeiture liability for these amounts, therefore,

must be based upon aider and abettor liability. I conclude that the government established beyond a reasonable doubt that Reiner aided and abetted Williams in obtaining Morales's tips revenue. For example, it was Reiner who fired Tara Morales from the Club because of her drug problems, her attitude problems, her difficulty getting along with manager Russell Pallas, and her overcharging customers for sex. It was Reiner who allowed her to return to the Club to work after a meeting with her pimp, Williams, in Kittery, Maine, reassured him that Tara Morales would behave differently. Additionally, Williams testified that Reiner called him whenever there was a problem with Morales's work at the Club. Witnesses testified about a meeting among Reiner, Pallas, and Williams at the Squire Club in Boston, where they discussed the prospect of Williams bringing more women from the Boston area to work at the Club. As I instructed the jury on this Count, to prove that Reiner aided and abetted, the government had to prove that he "consciously shared the other person's knowledge of the criminal conduct, intended to help him or her, and willfully took part in the endeavor, seeking to make it succeed." Therefore, just as the First Circuit does not limit a conspiracy count forfeiture to proceeds that the defendant personally obtained, Hurley, 63 F.3d at 22 (conspirators can be required to forfeit proceeds foreseeably reaped by other members of the conspiracy), I conclude that as an aider and abettor Reiner must forfeit Morales's tip proceeds foreseeably reaped by the principal, here the pimp Lance Williams. The remaining determinations are the actual amount of revenues that the government can prove was generated by the Club from Tara

Morales's customers; and the total amount of Tara Morales's tips. There certainly was better evidence available (the actual Club records) than Agent Giguere's "extrapolations" to calculate these amounts.[16] But because the parties have not analyzed this better evidence, neither do I.20 Instead, I find flaws in the figures
upon which Agent Giguere did rely to produce his calculations. Therefore, I do not find that the government has established the requested amount beyond a reasonable doubt, and I award a smaller amount. First, using the government's own methodology, I find that if "Morales work[ed at the Club] from July 2001 to June 9, 2004" but was "fired for several weeks (4 to 6 weeks) before being rehired," Gov't Ex. F-2, her total working time at the Club could not have been the government's 34-½ months. Id. When I do the same arithmetic, I find that Morales's total working time was 147 full weeks if she started July 1, 2001, worked until June 9,

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[16] At the bench hearing, Agent Giguere admitted on cross-examination that the government had in its possession and introduced at trial records from the Club that would indicate more precisely the number of customers each attendant saw per shift as well as employee attendance records. Even though there was trial testimony concerning Tara Morales's drug habit and unreliability as an employee, he did not review these club records for his forfeiture testimony calculating how many days Tara Morales actually showed up at work, how many hours she actually worked when she appeared, or how many customers she actually served. 20 The parties' failure to do so is understandable: the amount sought under Count 3 is, in practical effect, entirely subsumed by the greater amounts sought by the government on Counts 1, 2, and 7.

2004, and was fired for six weeks.[17] But it could have been as low as 143 full weeks (if she started July 31, 2001).[18] Because the government's burden is proof beyond a reasonable doubt, I base my calculations on the lower amount, 143 weeks. Next, the government asserts that Tara Morales averaged 4 to 5 customers per day. According to my notes, however, Tara Morales never testified about the number of customers she averaged per shift or per day.[19] Instead, she testified only that she started out working double shifts five days a week at the Club, but at some point reduced to four double shifts, leaving after the first shift on Mondays. Therefore, I do not find beyond a reasonable doubt that Tara Morales averaged 20 customers per week as the government asserts. The government asserts that Tara Morales's average tip per session was $200. Tara Morales testified that she charged different amounts for different sexual acts. She did admit that

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[17] From Sunday, July 1, 2001 until Wednesday, June 9, 2004, is 1,074 total days or 153.4 weeks; if she was fired for 6 weeks, her working time was 147.4 weeks, assuming no vacations or other time off.

[18] 22 From Tuesday, July 31, 2001 until Wednesday, June 9, 2004 is 1,044 total days or 149.1 weeks; if she was fired for 6 weeks, her working time was 143.1 weeks, assuming no vacations or other time off. At an average 4.3 weeks per month, that is approximately 33.3 months.

[19] Cheryl Vinton, another prostitute at the club, testified that on "an average good day" she would have "maybe four or five" customers, but that there were some days when she saw only "one or two [and] some days [she] didn't see any." Dalphine Van Tassel testified that, while the number of customers she had at the Club varied depending on the season or time of year, "[t]here were shifts where I saw none, there were shifts where the maximum, very maximum might be four or five [customers], but that was not common for me."

the rate for "intercourse itself" was "200 [dollars]" but that she "usually" requested $300 or more, and that she had only "maybe ten" sessions when she did not exchange any form of sex for money. But she did not testify how much she charged for sexual acts other than intercourse.[20] Alternatively, she testified that on a "slow day" she averaged "like 6 [hundred dollars]" and that on a "good day" she averaged "15 [hundred], sometimes a little more." She also testified that the very least she ever brought home was "maybe like 4 [hundred dollars]." As the government's standard of proof is beyond a reasonable doubt, I can find at most that Tara Morales averaged $600 per day [with two days at $1,500 and one day at $400]. On this basis, I calculate Tara Morales's tip revenue as $430,600.25 To determine the Club's revenues from Morales's customers, I must first determine the number of her customers, then multiply that amount by the Club's $70 entrance fee. Because the parties did not present to me Club records about how many customers Tara Morales had, I will determine the number indirectly from what I have calculated to be her total tips. I will assume that Tara Morales collected from each customer the maximum tip amount that she testified she collected, $200. (She testified that she usually asked for $300, but not that she received it. In any event, she received even less for other sexual acts, so

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[20] In comparison, other attendants at the club testified that they received anywhere between $50 and $200 in tip money depending on the sexual act performed. 25 I find that the government has proven beyond a reasonable doubt that Tara Morales had 715 working days (143 weeks, 5 days per week) at the Danish Health Club. $430,600 = (712 days times $600) + (2 days times $1,500) + (1 day times $400).

I am satisfied that the $200 figure will yield an appropriate number of customers beyond a reasonable doubt.) Total tip revenue, $430,600, divided by the maximum tip, $200, yields 2,153 customers. Club revenues, therefore, were $150,710 (2,153 customers times $70 per person). My calculations, then, on the amounts generated by Tara Morales's activities are $150,710 in Club revenues and $430,600 in tips, for a total of $581,310. Reiner must forfeit $581,310 under Count 3 according to the standards of Candelaria-Silva and Hurley. *(D) Count 7* For the money laundering conspiracy (Count 7), the government is seeking $3,349,602.26 as a "sum of money equal to the total amount of money involved" under 18 U.S.C. §§ 1956(h), 1957. See Superseding Indictment ¶ 11(b); Gov't Ex. F-3. Section 982(a)(1) directs forfeiture upon conviction of a violation of 18 U.S.C. §§ 1956 or 1957 of "any property, real or personal, involved in such offense." The government's burden of proof for money laundering forfeitures under 18 U.S.C. § 982(a)(1) is "preponderance of the evidence." United States v. Cunan, 156 F.3d 110, 116 & n.7 (1st Cir. 1998) ("In a criminal forfeiture [pursuant to 18 U.S.C. § 982 and 21 U.S.C. § 853], the government must show by a preponderance of the evidence that the defendant's property is forfeitable."); see also United States v. Voigt, 89 F.3d 1050, 1082 (3d Cir. 1996)

(preponderance of the evidence, rather than proof beyond a reasonable doubt, governs government's proof of forfeiture allegations under 18 U.S.C. § 982)(a)(1)). The plain language of section 982(a)(1) suggests that the scope of the forfeiture under Count 7 is at least as broad as, probably broader than,

Count 1. Unlike forfeiture under section 981(a)(1) and its criminal counterpart 28 U.S.C. § 2461(c), forfeiture under section 982 is not limited to amounts "obtained by" the defendant but extends to "any property . . . involved in such offense." In United States v. McGauley, the First Circuit cited approvingly the legislative history related to section 981 (the civil forfeiture statute that has language identical in many respects to section 982, the criminal forfeiture statute), which indicates that Congress intended "property . . . involved in" to be construed broadly: "[T]he term 'property involved' is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense." 279 F.3d 62, 76 n.14 (1st Cir. 2002) (quoting 134 Cong. Rec. § 17365 (daily ed. Nov. 10, 1988)). As a result, McGauley suggested that the standard for determining what funds are "involved in" a money laundering offense is less demanding than that for establishing "proceeds" obtained (discussed in Counts 1, 2, and 3, supra). Id. at 76-77 (distinguishing the proof for "proceeds" from that for "involved in," and holding that forfeiture of both legitimate and illegitimate funds is proper "as long as the government demonstrates that the defendant pooled the funds to facilitate, i.e., to disguise the nature and source of, his scheme.") (citation omitted).[21] My discussion of vicarious

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[21] Other Circuits also interpret the term "involved in" broadly, including property directly used to commit, or used to facilitate, the money laundering offense. See, e.g., United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005) ("Forfeiture under section 982(a)(1) in a money- laundering case allows the government to obtain a money judgment representing the value

liability for co-conspirators in Count 1, supra, also applies to Count 7. Accord United States v. Huber, 404 F.3d 1047, 1056 (8th Cir. 2005) ("The corpus of a money-laundering conspiracy is the funds that the defendant conspired to launder."). For Count 7, Agent Giguere explained that he added up all the disbursements in amounts over $10,00027 going out of the Club Business Checking Account at Ocean National Bank. His calculations, which are undisputed, started January 4, 1999, the first date for which the government was able to obtain bank

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of all property 'involved in' the offense, including 'the money or other property being laundered (the corpus),' and 'any property used to facilitate the laundering offense.'") (citation omitted); United States v. Baker, 227 F.3d 955, 969, 971 (7th Cir. 2000) ("*[A]ll* of the funds from Baker's prostitution business over the years—both the proceeds from credit card and ATM transactions and other proceeds—were illegal, and as a result Baker *laundered all of them*"; "because the millions of dollars that Baker generated from his prostitution business over the years facilitated his money laundering conspiracy, the district court did not clearly err in including these proceeds in its forfeiture order as monies 'involved in' Baker's offense."); United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) ("Property 'involved in' an offense 'include[s] the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense") (citation and emphasis omitted). See also Stefan D. Cassella, The Forfeiture of Property Involved in Money Laundering Offenses, 7 Buff. Crim. L. Rev. 583, 615 & n.80 (2004) ("Based on the legislative history, seven Courts of Appeals and numerous lower courts have held that the term 'property involved' should be read broadly to include the money or other property being laundered (the 'corpus' or 'subject matter' of the money laundering offense); any commissions and fees paid to the money launderer; and any property used to facilitate the money laundering offense. No court has held to the contrary.").

records, and concluded June 2, 2004, just before the government raid shut down the Club. See Gov't Ex. F-3. These deposits were disbursed primarily to K&D Realty Trust (of which Reiner ultimately was a trustee) as well as to Reiner, Reiner's law firm, and co-defendant Mary Ann Manzoli, the beneficiary of K&D Realty Trust. As articulated by the Eighth Circuit, "the corpus of a money-laundering conspiracy rests on whether certain conduct involving funds constitutes money laundering." Huber, 404 F.3d at 1056. The jury verdict on Count 7 shows beyond a reasonable doubt that Reiner conspired with the Club and other persons knowingly to engage in monetary transactions of more than $10,000 involving criminally derived funds from specified unlawful activity, namely, violations of the Travel Act, transporting persons in interstate commerce with the intent that such individuals engage in prostitution, and enticing persons to engage in prostitution. That activity constitutes illegal money laundering. I conclude that the government has established by a preponderance of the evidence, therefore, that the funds disbursed out of the Club's bank account were proceeds "involved in" those specified unlawful activities.[22] I

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[22] I note that 18 U.S.C. § 982(b)(2) "protects against forfeiture a defendant who 'acted merely as an intermediary who handled but did not retain the property' unless the defendant 'conducted three or more separate transactions involving a total of $100,000 or more in a twelve-month period.'" Hurley, 63 F.3d at 21-22, quoting 18 U.S.C. § 982(b)(2). Because of the number of transactions, Reiner does not qualify for this "narrow safe harbor," id. 29 I find by a preponderance of the evidence that Reiner joined the conspiracy well before January 4, 1999. As explained for the conspiracy in Count 1, supra, I find that Reiner was not only counseling but assisting his clients in

also find by a preponderance of the evidence that the January 1999 start date is appropriate for Count 7.29 Since Agent Giguere's calculations have not been

challenged, the government is entitled to a forfeiture of $3,349,602.26 on Count 7. *(E) The Excessive Fines Clause of the Eighth Amendment* Without citing any cases, Reiner's legal memorandum asserts that the

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conduct he knew to be illegal. As Reiner described in his own testimony, after 1992 when he first negotiated with Leo Manzoli for compensation for his work on behalf of the Club, he was "steadily being asked to do more and more for either Joel [Lehrer] or K&D Realty Trust, [or] for Mary Ann [Manzoli]." Between 1990 and 2001, for example, Reiner testified that he was involved with the Club efforts to comply with the Kittery Town Ordinance regulating massage therapy—including "explain[ing] to somebody what [she] had to do to comply with the town's ordinance," helping her fill out the application if necessary, and even arranging for a massage therapy "school" with his contact in Vermont. Cheryl Vinton, who started working at the Club in 2000, stated that Reiner attended at least the majority of employee meetings; Reiner himself admitted that he attended two or three meetings "from 2000 to, say, September of 2001" in which the overcharging of customers was discussed. Legal records from the firm of Reiner and Bouffard indicate that Reiner was involved in employee matters with the prostitutes in early 1999. See Gov't Ex. 109 (2/26/99: "Travel to Kittery Health Club conference with client; re: corporate personnel matters;" 3/3/99: "Travel to Club conference with Joel [Lehrer] and J.B. re: personnel matter; Telephone conference with client; re: personnel matters; Office conference with client; re: personnel matters.") Despite Reiner's protestation that illegal prostitution at the Club was never proven to him, I am satisfied, as was the jury, that at least under the willful blindness standard he possessed the necessary criminal intent and joined the conspiracy at an early date.

forfeiture violates the Eighth Amendment. "Forfeitures are subject to the Eighth Amendment's excessive fines clause 'if they constitute punishment for an offense'" but a "forfeiture will violate the Eighth Amendment's prohibition only if it is 'grossly disproportional to the gravity of the defendant's offense.'" United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (quoting United States v. Bajakajian, 524 U.S. 321, 328, 336-37 (1998)); Candelaria-Silva, 166 F.3d at 44 ("It is well-established . . . that the imposition of such a forfeiture judgment [under the principle of joint and several liability] does not constitute an unconstitutionally excessive fine."). The First Circuit considers: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." Heldeman, 402 F.3d at 223. Applying the Heldeman factors, I conclude first that Reiner plainly falls into the class of persons at whom the relevant criminal statutes30 were directed—Reiner assumed a leadership role for the Club, the hub of the illegal activity. Next, I conclude that this forfeiture judgment is in line with other penalties authorized. For the Count 7 conviction, Congress has authorized a fine of up to twice the amount of the criminally derived property, 18 U.S.C. § 1957(b)(2) ("The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction"), i.e., twice the amount of the laundered money. The forfeiture awarded here is well under that authorized penalty.31 Finally I

conclude that this forfeiture award is consonant with the harm Reiner personally caused. His involvement with this hugely successful interstate prostitution operation for over a decade allowed the business not only to survive, but to flourish. Without his self-described "devot[ion] of his best efforts" to rescue the Club from mismanagement and economic disarray, the Club might well have failed, and women and customers would not have crossed state lines to engage in prostitution. As a result, I conclude that the forfeiture the government seeks is not "grossly disproportional to the gravity of [Reiner's] offense[s]." Bajakajian, 524 U.S. at 337. The government seeks a single money judgment against Reiner in the amount of $3,927,392.40—the greatest amount sought for all four Counts—to avoid any double counting. "[H]olding a defendant liable for an amount of money foreseeably laundered by himself and his own co-conspirators is quite rational based on a proportionality analysis." Hurley, 63 F.3d at 23 (rejecting an Eighth Amendment challenge to a forfeiture judgment). "The government can collect its" $3,927,392.40 "only once, but subject to that cap, it can collect from any [co-conspirator] so much of that amount as was foreseeable to that [co-conspirator]." Id. The amounts here were not only reasonably foreseeable to Reiner but largely known to him. III. CONCLUSION Count 3 supports a money judgment in the amount of $581,310. Count 1 and 2 each supports a money judgment in the amount of $3,927,392.40. Count 7 supports a money judgment in the amount of $3,349,602.26. The government shall file a preliminary order of forfeiture reflecting the largest amount,

$3,927,392.40, as a joint and several liability on the part of Reiner with his co-defendants.

SO ORDERED.
DATED THIS 31ST DAY OF OCTOBER, 2005
/S/
D. BROCK HORNBY

D. BROCK HORNBY UNITED STATES DISTRICT JUDGE

18 U.S.C.A. § 982 (Effective: November 2, 2002 to October 3, 2006)

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate--

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

U.S. CONST. amend. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U.S. CONST. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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FEB 25 2008
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SUPREME COURT, U.S.

No. 07-673

In the Supreme Court of the United States

GARY REINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly ordered petitioner to forfeit, under 18 U.S.C. 981(a)(1)(C) and (2)(A), the foreseeable proceeds of the interstate prostitution conspiracy in which he participated.

2. Whether the district court correctly calculated the amount of money that petitioner was required to forfeit under 18 U.S.C. 982(a)(1) (Supp. V 2005) as "property * * * involved in" his money laundering offense.

3. Whether the district court abused its discretion in sentencing petitioner to a within-Guidelines sentence of 60 months of imprisonment.

4. Whether the district court abused its discretion in denying petitioner's motion for a mistrial based on allegedly prejudicial testimony, where the court instructed the jury to disregard the testimony.

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In the Supreme Court of the United States

No. 07-673

GARY REINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 500 F.3d 10. The memorandum opinion of the district court on forfeiture (Pet. App. A17-A42) is reported at 397 F. Supp. 2d 101.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2007. The petition for a writ of certiorari was filed on November 19, 2007 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, petitioner was convicted of conspiracy to violate the Travel Act and the Mann Act; traveling in interstate commerce to promote prosti-

tution; inducing an individual to travel in interstate commerce to engage in prostitution; and conspiracy to commit money laundering. He was sentenced to 60 months of imprisonment, to be followed by three years of supervised release. Petitioner was also ordered to forfeit $3,927,392.40 jointly and severally with his co-defendants. The court of appeals affirmed. Pet. App. A1-A16; Judgment 1-5; Final Order of Forfeiture.

1. From January 1999 to June 2004, petitioner and several associates operated an interstate prostitution ring under the guise of a legitimate massage parlor in Kittery, Maine. Between 2001 and 2004, petitioner handled the operation's finances and oversaw its daily business. He was also responsible for all personnel decisions and the content of advertisements that the operation placed in adult publications. Pet. App. A2-A3, A8, A38-A39 & n.29.

In April 2005, a grand jury in the District of Maine charged petitioner with conspiracy to operate an interstate prostitution ring, in violation of the Travel Act and the Mann Act (18 U.S.C. 371; 18 U.S.C. 1952 (2000 & Supp. V 2005); 18 U.S.C. 2421; and 18 U.S.C. 2422 (Supp. V 2005)) (Count 1); traveling in interstate commerce to promote prostitution, in violation of the Travel Act (18 U.S.C. 2 and 18 U.S.C. 1952 (2000 & Supp. V 2005)) (Count 2); inducing an individual to travel in interstate commerce to engage in prostitution, in violation of the Mann Act (18 U.S.C. 2 and 18 U.S.C. 2422(a) (Supp. V 2005)) (Count 3); and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h) and 1957 (Count 7). Pet. App. A2, A4; Superseding Indictment 1-10.

2. At trial, several of petitioner's co-conspirators, associates, and customers testified against him, including Russell Pallas, a former police officer whom peti-

tioner had hired to manage the massage parlor's front desk. See Pet. App. A3-A4; Gov't C.A. Br. 7-23. When asked about police surveillance at the parlor, Pallas testified that petitioner told him "we were being watched by the FBI from across the street, and it was originally based on a complaint of under-aged girls at the club." *Id.* at 23-24; see Pet. App. A4. Petitioner objected to the "mention of under-aged girls." Gov't C.A. Br. 24. He moved to strike the testimony and for a mistrial. Pet. App. A4. The court struck the testimony and instructed the jury, at petitioner's request, "to disregard the comment of under-age girls" because "[t]here is no charge against [petitioner] concerning under-age girls in this case." Gov't C.A. Br. 24; see Pet. App. A4. After finding no government misconduct, the court denied the motion for a mistrial. Gov't C.A. Br. 24. At the trial's conclusion, the court reminded the jury that "anything * * * I have * * * instructed you to disregard is not evidence" and "[y]ou must not consider it." *Id.* at 46. The jury found petitioner guilty of all the charges. Pet. App. A4.

At sentencing, the district court determined that petitioner's recommended sentencing range under the advisory United States Sentencing Guidelines was 51 to 63 months of imprisonment. Pet. App. A5. Petitioner argued that he should receive a sentence similar to the six-month prison term that Pallas received or the five-year term of probation that Mary Ann Manzoli (a second co-conspirator) received. Sent. Tr. 81. The court rejected that argument, reasoning that Pallas was a low-level "employee" in the scheme, and Pallas and Manzoli had accepted responsibility by pleading guilty and had provided "critical" testimony against petitioner, whereas petitioner was the "linchpin" of the operation yet

pleaded "innocent ignorance" at a jury trial. *Id.* at 81-84. After considering the sentencing factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005), the court sentenced petitioner to 60 months of imprisonment. Sent. Tr. 86-87.

The district court also ordered petitioner to forfeit $3,927,392.40 as a joint and several liability with his co-defendants. Pet. App. A42; Final Order of Forfeiture. On the charge of an interstate prostitution conspiracy (Count 1), the court concluded that petitioner was liable to forfeit $3,927,392.40, the gross receipts of the prostitution operation between August 2000 and June 2004. Pet. App. A20-A28. Relying principally on *United States* v. *Hurley*, 63 F.3d 1 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996), the court held that "conspirators are vicariously liable for the foreseeable criminal conduct of their co-conspirators and therefore can be required to forfeit proceeds that other members of the conspiracy foreseeably reap." Pet. App. A25. The court found that the prostitution operation's gross receipts of $3,927,392.40 "were foreseeable" to petitioner. *Id.* at A26. Accordingly, the court concluded that petitioner had "obtained" $3,927,392.40 in forfeitable "proceeds," within the meaning of 18 U.S.C. 981(a)(1)(C) and (2)(A), the forfeiture provisions applicable to Count 1. Pet. App. A20-A21 & n.9, A28.

The district court also concluded that petitioner was liable, under the same provisions, to forfeit the same amount for the Travel Act violation (Count 2). The court reasoned that the gross receipts of the operation represented the proceeds that petitioner had either personally obtained or had aided and abetted his co-defendants to obtain. Pet. App. A28-A29. On the charge of inducing an individual to travel in interstate commerce to engage

in prostitution (Count 3), the court concluded that petitioner was liable, under 18 U.S.C. 2253(a), to forfeit $581,310, the proceeds that the prostitute's activities had generated. Pet. App. A29-A35.

On Count 7, the money laundering count, the district court found that petitioner was subject to forfeiture of $3,349,602.26. Pet. App. A39. The court concluded that this sum represented the money "involved in" petitioner's money laundering offenses under 18 U.S.C. 1956(h) and 1957, and therefore was the amount forfeitable under 18 U.S.C. 982(a)(1) (Supp. V 2005), the forfeiture provision applicable to money laundering. Pet. App. A35-A39. "[T]o avoid any double counting," the court imposed a "single money judgment * * * of $3,927,392.40—the greatest amount sought for all four Counts," *id.* at A41, "as a joint and several liability on the part of [petitioner] with his co-defendants," *id.* at A42. See Final Order of Forfeiture.

3. The court of appeals affirmed petitioner's convictions and sentence, including the forfeiture order. Pet. App. A1-A16.

a. As relevant here, the court rejected petitioner's arguments that the district court erred in ordering him to forfeit $3,927,392.40. Petitioner argued that he had not "obtained" (see Pet. App. A22) the entire gross receipts of the prostitution operation because he had "never used or personally possessed the money." *Id.* at A16; Pet. C.A. Br. 63-64. The court of appeals found that contention foreclosed by its earlier decision in *Hurley*, which "held that the principle of finding members of a conspiracy substantively liable for the foreseeable conduct of other members of the conspiracy

extend[s] to forfeiture rules." Pet. App. A16 (citing *Hurley*, 63 F.3d at 22).[1]

Petitioner also argued that the district court had erred in determining that he was liable to forfeit $3,349,602.26 under Count 7. Pet. C.A. Br. 64-66. He contended that the district court had mistakenly "fail[ed] to separate legitimate from illegitimate funds" when finding the amount of property "involved in" the money-laundering offense. *Id.* at 66. The court of appeals rejected that contention, pointing out that the district court had "determin[ed] that all of the [massage parlor's] proceeds were subject to forfeiture because the [parlor] was nothing more than a front for illegal prostitution." Pet. App. A16. "Reviewing the record," the court concluded that the district court's finding was "not clearly erroneous," because "[t]he sole purpose of the [massage parlor] was prostitution." *Ibid.*

b. The court of appeals also held that petitioner's 60-month, within-Guidelines prison term was not unreasonable. Pet. App. A11-A15. The court concluded that the district court had correctly calculated the Guidelines range, *id.* at A11-A12, and that petitioner's 60-month sentence was substantively reasonable because it was a "defensible overall result" that the court had supported with "a plausible explanation," *id.* at A13 (quoting *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc), cert. denied, 127 S. Ct. 928 (2007)). The court of appeals rejected petitioner's claim of "an unwarranted sentence disparity" between his sentence and the sentences of Manzoli and Pallas. *Id.* at A14.

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[1] Petitioner did not challenge, and the court of appeals did not disturb, the district court's finding (Pet. App. A26) that the operation's gross receipts of $3,927,392.40 were foreseeable to petitioner under *Hurley*.

The court explained that the sentencing differential was not unwarranted because, unlike petitioner, Manzoli and Pallas had "accepted responsibility for what they had done and then cooperated with the government." *Id.* at A14-A15.

c. The court of appeals also rejected petitioner's contention that the district court had abused its discretion in denying petitioner's motion for a mistrial based on Pallas's testimony about under-age girls. Pet. App. A9-A11. The court of appeals observed that the district court had "immediately struck" Pallas's testimony and had instructed the jury to disregard it. *Id.* at A10. Recognizing that, "whenever 'a curative instruction is promptly given, a mistrial is warranted only in rare circumstances implying extreme prejudice,'" *id.* at A9 (quoting *United States* v. *Torres*, 162 F.3d 6, 12 (1st Cir. 1998), cert. denied, 526 U.S. 1057 (1999)), the court found no "extreme prejudice" in petitioner's case. Petitioner claimed prejudice based on a statement that one juror had made during voir dire that "she was close to two individuals who had suffered from sexual abuse." *Ibid.* But the court of appeals found that the juror's voir dire statement did not "rebut[] th[e] presumption" that jurors follow curative instructions, and the court therefore "conclude[d] that the district court did not abuse its discretion in denying [the] motion for a mistrial." *Id.* at A10-A11.

ARGUMENT

Petitioner reiterates his forfeiture, sentencing, and mistrial claims. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore not warranted.

1. Petitioner contests (Pet. 8-13) the forfeiture order of $3,927,392.40 under Count 1, the interstate prostitution conspiracy charge, on the ground that he did not personally "obtain[]" the entire gross receipts of the prostitution operation. The court of appeals correctly rejected that argument and it does not warrant this Court's review.[2]

a. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. 981 *et seq.*, subjects to forfeiture "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to * * * any offense constituting 'specified unlawful activity' * * * or a conspiracy to commit such offense." 18 U.S.C. 981(a)(1)(C). In cases, such as this one, which involve "illegal services," the term "proceeds" is expressly defined to mean "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." 18 U.S.C. 981(a)(2)(A). Petitioner does not dispute that those provisions apply to the interstate prostitution conspiracy for which he was convicted under Count 1. See Pet. 8-13; see also Pet. App. A20-A21; 18 U.S.C. 1956(c)(7)(A) (defining "specified unlawful activity" to include any offense listed under 18 U.S.C. 1961(1)); 18 U.S.C. 1961(1) (Supp. V 2005) (listing viola-

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[2] Petitioner is not clear whether this challenge to the forfeiture order is limited to Count 1 or also extends to Counts 2 and 3. See Pet. 8-13. Because the district court entered a money judgment equal to the amount of forfeiture ordered on Count 1, and the amounts ordered on Counts 2 and 3 are less than or equal to that amount, any challenge to the forfeiture on Counts 2 and 3 would have no effect on the judgment if the forfeiture order on Count 1 is valid. We therefore respond to petitioner's argument only as it relates to Count 1.

tions of 18 U.S.C. 1952 (2000 & Supp. V 2005); 18 U.S.C. 2421; and 18 U.S.C. 2422 (Supp. V 2005)); 18 U.S.C. 1956(c)(7)(B)(vii) (2000 & Supp. V 2005) (defining "specified unlawful activity" to include "trafficking in persons * * * or transporting, recruiting or harboring a person, * * * for commercial sex acts"); 28 U.S.C. 2461(c) (allowing government to seek forfeiture in a criminal case whenever a person is charged with violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized).

As he argued in the court of appeals, petitioner contends that he did not "obtain[] directly or indirectly" the gross receipts of the massage parlor because he "only delivered" the parlor's money to the bank "*and never had any right* to" it. Pet. 9. The court of appeals correctly rejected that argument. Under this Court's decision in *Pinkerton* v. *United States*, 328 U.S. 640 (1946), all members of a conspiracy are liable for "the substantive offense[s] * * * committed by [any] one of the conspirators in furtherance of the unlawful project," where (as here) such conduct is foreseeable. *Id.* at 647. As the court of appeals earlier observed in *Hurley*, "[i]t would be odd * * * to depart from this principle" of vicarious liability "when it comes to apply[ing] the forfeiture rules." 63 F.3d at 22. And the phrase "obtained directly or indirectly" in Section 981(a)(2)(A) is broad enough to encompass both funds that a conspirator obtains personally and funds that he obtains "indirectly" by virtue of his participation in the conspiracy. See *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997).

Contrary to petitioner's suggestion (Pet. 12-13), CAFRA and related forfeiture statutes serve interests "beyond merely separating a criminal from his ill-gotten

gains." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 629 (1989). Specifically, they are focused on punishment and remuneration, imposing forfeiture "as a kind of shadow fine" and using the amount of a criminal enterprise's proceeds as a means of measuring harm to, and recompensing, the enterprise's victims and society at large. *Hurley*, 63 F.3d at 21; see *Libretti* v. *United States*, 516 U.S. 29, 39 (1995) ("criminal forfeiture * * * 'is clearly a form of monetary punishment,'" much like a fine) (citation omitted); *Caplin & Drysdale*, 491 U.S. at 629-630 (forfeiture serves "the objective of returning property, in full, to those wrongfully deprived or defrauded of it," helps to "lessen the economic power" of criminals, and also subsidizes law-enforcement activities). It is entirely consistent with those broader principles to hold all co-conspirators jointly and severally liable for the forfeiture of the foreseeable proceeds of the entire conspiracy.

Indeed, given that petitioner was "the critical linchpin" of the prostitution scheme (Sent. Tr. 83; see *id.* at 85), it would flout congressional intent to absolve him from the punitive effects of forfeiture simply because of the "fortuit[y]" that he served as a conduit rather than a recipient of the operation's proceeds. *Hurley*, 63 F.3d at 22; see *id.* at 21 ("since temporary custody is certainly enough for a possession charge in a drug case, it is hard to see why 'obtained' should be read more narrowly" (citation omitted)).

All of the other courts of appeals that have addressed the issue have held that the forfeiture statutes impose vicarious liability on co-conspirators. See, *e.g.*, *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988) (per curiam); *McHan*, 101 F.3d at 1043 (4th Cir.); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th

Cir. 2002), cert. denied, 537 U.S. 1192, 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005), cert. denied, 546 U.S. 1095, 1122 (2006); *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *United States* v. *Caporale*, 806 F.2d 1487, 1506-1509 (11th Cir. 1986), cert. denied, 482 U.S. 917 and 483 U.S. 1021 (1987); see also *United States* v. *Wilson*, 742 F. Supp. 905, 909 (E.D. Pa. 1989), aff'd, 909 F.2d 1478 (3d Cir.) (Table), cert. denied, 498 U.S. 1016 (1990). In light of the uniformity among the courts of appeals, this Court's review is unwarranted.

b. Petitioner erroneously contends (Pet. 8-13) that the decision below conflicts with the Seventh Circuit's decision in *United States* v. *Masters*, 924 F.2d 1362, cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991). *Masters* actually rejected an argument that the defendant did not "obtain[]" certain bribe money that he merely forwarded to his co-conspirators and held that, because there is "joint and several liability," each co-conspirator "is fully liable for the receipts of the other members of the enterprise." *Id.* at 1369-1370; see *id.* at 1370 ("The fact that [the defendant] did not keep the whole amount is irrelevant given the jointness of each of the [co-conspirators'] liability."). The Seventh Circuit recently reaffirmed that "the proceeds of a conspiracy are a debt owed by each of the conspirators," observing that "[i]t would be absurd to treat them more leniently than the law treats a lawful partnership, all of whose members are severally as well as jointly liable for the partnership's debts." *Spano*, 421 F.3d at 603 (citing, *inter alia*, *Edwards*, 303 F.3d at 643-644).

Petitioner mistakenly argues (Pet. 12-13) that the decision below conflicts with *Masters* on the meaning of

the word "proceeds." Petitioner is correct that *Masters* held, contrary to every other court of appeals that has considered the issue, that, under the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), the term "proceeds" refers to net profits, not gross receipts. 924 F.2d at 1369-1370; but see *Hurley*, 63 F.3d at 21 (holding that "proceeds," as used in the RICO provision, means gross receipts, not "profits"); *Simmons*, 154 F.3d at 770-771 (same); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997) (same). In addition, this Court recently heard argument in *United States* v. *Santos*, No. 06-1005 (argued Oct. 3, 2007), to resolve a related circuit conflict over whether the term "proceeds," as used in the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), means the gross receipts from unlawful activities or only the net profits. But neither of those conflicts is implicated in this case. The forfeiture on Count 1 does not involve either Section 1956(a)(1) or Section 1963(a)(3), but rather 18 U.S.C. 981(a)(1)(C) and (2)(A). As explained above, Section 981(a)(2)(A) expressly states that, in a case involving illegal services, the term "proceeds" includes "any property traceable" to the offense and "is not limited to the net gain or profit realized" therefrom. The decisions below are fully consistent with that definition. Because the parallel circuit conflicts on the scope of Sections 1956(a)(1) and 1963(a)(3) are not implicated by the forfeiture order on Count 1, they do not support either granting plenary review or holding the petition in this case pending the Court's decision in *Santos*.

Even if there were some conflict of authority that bore on Count 1, further review would be inappropriate because this Court's resolution of the conflict would have no practical impact on petitioner's sentence. Apart

from the forfeiture ordered on Count 1 (and Counts 2 and 3), petitioner was also correctly ordered to forfeit $3,349,602.26 on Count 7, the money laundering charge. The $3,349,602.26 forfeiture order on Count 7 suffices to cover any amount that petitioner will realistically have to pay, no matter what this Court's disposition on Count 1.

The government cannot recover from petitioner any amounts forfeited by his co-conspirators. See Pet. App. A41; *Hurley*, 63 F.3d at 23 (government can collect enterprise's total receipts "only once"). And one of petitioner's co-conspirators, Manzoli, has already forfeited at least $2,177,947.11. Sent. Tr. 14-15. Thus, as a practical matter, petitioner will not be required to pay a penny more than the amount that he has been ordered to forfeit under Count 7.

Moreover, any conflict on the meaning of the words "obtain" and "proceeds" would not affect the correctness of the forfeiture order on Count 7. Forfeiture under Count 7 is governed by 18 U.S.C. 982(a)(1) (Supp. V 2005). As the district court observed, that provision "is not limited to ['proceeds'] 'obtained by' the defendant but extends to 'any property * * * involved in such offense.'" Pet. App. A35-A36. Accordingly, no conflict among the courts of appeals is implicated by this case.

2. Petitioner also mistakenly contends that the forfeiture order under Count 7 is erroneous because the courts below did not distinguish between "the legitimate and illegitimate funds that came into the [massage parlor]." Pet. 14-15. Contrary to that contention, it is irrelevant whether the forfeited funds were legitimate or illegitimate, because 18 U.S.C. 982(a)(1) (Supp. V 2005) calls for the forfeiture of all "property * * * involved in [the] offense," without distinguishing legitimate from ill-

gotten gains. In any event, the district court concluded that all of the receipts of the massage parlor were illegitimate because "the Club's seemingly legitimate locker room, whirlpool, spa, and entrance fee[] were all just a front so that the health club could remain open as a house of illegal prostitution." Pet. App. A24. "Reviewing the record," the court of appeals concluded that "the district court's determination regarding the nature of the [massage parlor] [was] not clearly erroneous," and "[t]he sole purpose of the [massage parlor] was prostitution." *Id.* at A16. That finding of fact, on which both courts below were in agreement, does not present a recurring issue of importance for this Court to resolve. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

3. This Court's review is also not warranted to address petitioner's fact-bound contention (Pet. 15-19) that his sentence is unreasonable. Petitioner argues that his within-Guidelines sentence of 60 months of imprisonment is substantively unreasonable because it is unduly harsh in comparison to the sentences received by co-conspirators Pallas and Manzoli. That claim was correctly rejected by both the district court and the court of appeals, and it does not warrant this Court's review. See *Graver Tank*, 336 U.S. at 275; *Johnston*, 268 U.S. at 227.

As this Court recently held in *Gall* v. *United States*, 128 S. Ct. 586 (2007), a claim that a sentence is substantively unreasonable is reviewed under a "deferential abuse-of-discretion standard." *Id.* at 591. Moreover, sentences within the advisory range recommended by the Sentencing Guidelines are especially likely to be reasonable. See *Rita* v. *United States*, 127 S. Ct. 2456,

2463-2465 (2007). Applying a deferential standard of review consistent with *Gall* and *Rita*, the court of appeals correctly concluded that the difference in the sentences received by petitioner and co-conspirators Pallas and Manzoli did not render petitioner's sentence substantively unreasonable. Pet. App. A13-A15. The district court cited numerous facts that justified giving petitioner a sentence substantially longer than the sentences that Pallas and Manzoli received: Pallas was a low-level "employee" in the scheme, Pallas and Manzoli had accepted responsibility by pleading guilty, and they had provided "critical" testimony against petitioner, whereas petitioner was the "linchpin" of the operation and, instead of accepting responsibility, he lost at a jury trial. Sent. Tr. 81-84. As the court of appeals correctly concluded, those facts amply established that petitioner is not "similarly situated to Pallas and Manzoli," and his sentence is entirely reasonable. Pet. App. A14. There is no cause for this Court to revisit that fact-specific conclusion.

4. Petitioner's similarly fact-bound contention (Pet. 19-25) that the district court erroneously denied his motion for a mistrial also does not warrant this Court's review. Petitioner himself acknowledges (Pet. 20) that the decision to grant or deny a mistrial is a discretionary one. Nor does petitioner dispute the court of appeals' statement that, "whenever a curative instruction is promptly given, a mistrial is warranted only in rare circumstances implying extreme prejudice." Pet. App. A9 (internal quotation marks omitted); see *Francis* v. *Franklin*, 471 U.S. 307, 325 n.9 (1985) ("Absent * * * extraordinary situations, * * * we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.").

Petitioner's only dispute is with the lower courts' on-the-scene assessment that extreme prejudice did not occur here. The court of appeals took into account the concerns that juror 19 expressed at voir dire, but concluded that Pallas's "isolated comment" about "under-age girls" did not rise to the level requiring a mistrial. Pet. App. A10. Because there was no prosecutorial misconduct (see Gov't C.A. Br. 24), and the district court "immediately struck" Pallas's fleeting comment (Pet. App. A9-A10), the court of appeals' determination that petitioner did not suffer "extreme prejudice" does not "so far depart[] from the accepted and usual course of judicial proceedings" that it warrants this Court's review. Sup. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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